

BIENNIAL REPORT
of the
ATTORNEY GENERAL
STATE OF FLORIDA

From January 1, 1963, through December 31, 1964

JAMES W. KYNES
Attorney General



Tallahassee, Florida
1965

DEDICATION

This Biennial Report is respectfully dedicated to Justice Richard W. Ervin, who served as Attorney General with great distinction from January, 1949, to January, 1964, when he was appointed by Governor Farris Bryant to the Supreme Court. His devotion as a public official has been an inspiration to the members of his staff and to other government officials of the State. His diligent leadership and wise judgment in legal matters during the past fifteen years, in behalf of the citizens of Florida, has created for him a merited reputation among the legal profession. The members of my staff who worked with him during the years, both legal and secretarial, join me in this dedication as an expression of affection and high esteem.

James W. Kynes
Attorney General



STATE OF FLORIDA
OFFICE OF THE
ATTORNEY GENERAL
TALLAHASSEE

JAMES W. KYNES
ATTORNEY GENERAL

December 31, 1964

LETTER OF TRANSMITTAL

TO HIS EXCELLENCY
HONORABLE HAYDON BURNS
GOVERNOR OF FLORIDA

SIR:

I have the honor of submitting to you the Biennial Report of the Attorney General during the term of Honorable Richard W. Ervin, January 1, 1963, through January, 1964, and my term from January, 1964, through December 31, 1964. This report is submitted as required by the constitution, directing each officer of the Executive Department to make a report of the official acts of his office, and of the requirements of same, to the Governor at the beginning of each regular session of the legislature or whenever the Governor shall require a report.

The report includes opinions of general interest, advisory opinions rendered by the Supreme Court to the Governor, a listing of former Attorneys General and a statement of the constitutional and statutory duties of the office.

Opinions are numbered numerically as released each year beginning with the first opinion as 063-1 and 064-1 respectively.

A table of statute and constitution sections cited in the opinions and an alphabetical subject index may be found in the last portion of the report.

Respectfully submitted,
JAMES W. KYNES
ATTORNEY GENERAL

BIENNIAL REPORT

EDITORIAL STAFF

CHARLES TOM HENDERSON.....*Director of Statutory Revision
and Bill Drafting, Assistant Attorney General*

SALLYE C. FLOURNOY.....*Editor*

ROSE D. KITCHEN.....*General Indexing*

JEWELL R. ROEMER.....*Citator*

DOROTHY M. STARK.....*Copy Editor*

LILYAN D. GARRISON.....*Copy Editor*

TABLE OF CONTENTS

	Page
Dedication	ii
Letter of Transmittal	iii
Editorial Staff	iv
Table of Contents	v
Attorneys General of Florida since 1845	vii
In Memoriam Honorable J. Robert McClure, Sr.	viii, ix
Organization Chart of Attorney General's Office	x, xi
List of Office Personnel, Legal Department	xii-xiii
Statutory Revision Department	xv
Explanation	xvi

OPINIONS

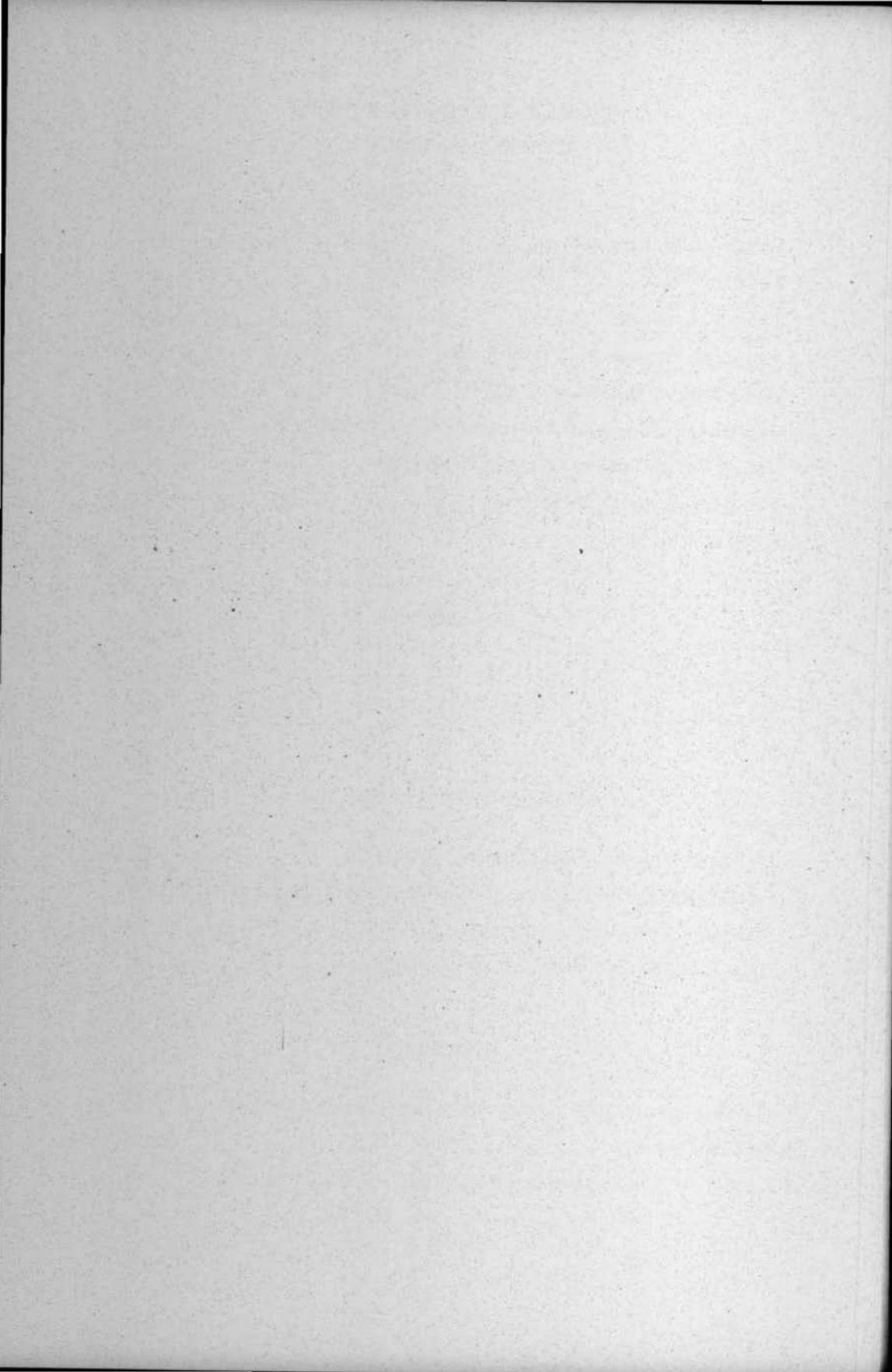
Opinions 1963	1
Opinions 1964	215

REPORTS AND STATISTICS

1963, 1964 Constitutional Amendments	527
Constitutional and Statutory duties of Attorney General	536
Statutory Revision Department	541
Cases Handled in Attorney General's Office	545

INDEXES

Omitted Opinions by number and subject matter 1963-1964	548
General Index	549
Citator to State Statutes, Constitution and Sessions Laws	591



ATTORNEYS GENERAL OF FLORIDA

SINCE 1845

JOSEPH BRANCH.....	1845-1846
AUGUSTUS E. MAXWELL.....	1846-1848
JAMES T. ARCHER.....	1848-1848
DAVID P. HOGUE.....	1848-1853
MARIANO D. PAPY.....	1853-1860
JOHN B. GALBRAITH.....	1860-1868
JAMES D. WESTCOTT, JR.....	1868-1868
A. R. MEEK.....	1868-1870
SHERMAN CONANT.....	1870-1870
J. P. C. DREW.....	1870-1872
H. BISBEE, JR.....	1872-1872
J. P. C. EMMONS.....	1872-1873
WILLIAM A. COCKE.....	1873-1877
GEORGE P. RANEY.....	1877-1885
C. M. COOPER.....	1885-1889
WILLIAM B. LAMAR.....	1889-1903
JAMES B. WHITFIELD.....	1903-1904
W. H. ELLIS.....	1904-1909
PARK TRAMMELL.....	1909-1913
THOMAS F. WEST.....	1913-1917
VAN C. SWEARINGEN.....	1917-1921
RIVERS BUFORD.....	1921-1925
J. B. JOHNSON.....	1925-1927
FRED H. DAVIS.....	1927-1931
CARY D. LANDIS.....	1931-1938
GEORGE COUPER GIBBS.....	1938-1941
J. TOM WATSON.....	1941-1949
RICHARD W. ERVIN.....	1949-1964
JAMES W. KYNES.....	1964-1964



In Memoriam

J. ROBERT McCLURE

J. ROBERT McCLURE

1904 - 1963

*"And the tear that we shed,
though in secret it rolls,
Shall long keep his memory green
in our souls." . . . THOMAS MOORE*

J. Robert McClure was born in Pensacola, Florida on October 17, 1904, and passed away suddenly in Tallahassee, Florida, on December 24, 1963. Immediate survivors are his widow, the former Florina Davis of Madison, Florida; two sons, J. Robert McClure, Jr., and Charles Davis McClure; and two granddaughters.

"Bob" McClure, as he was affectionately known, attended school in Pensacola and graduated from the University of Florida in 1926. He was President of Theta Chi Social Fraternity and a member of Phi Delta Phi Legal Fraternity.

Choosing law as his profession, he began his practice upon his admission to the Bar in 1939 as a member of the firm of Davis, Davis and McClure of Madison. He was a member of the Tallahassee and Florida Bar and had been admitted to practice before the Supreme Court of the United States. He also served as County Prosecutor for Madison County.

In 1943 "Bob" was appointed Executive Secretary to Spessard L. Holland, then Governor of Florida. He later served as Secretary to the State Road Board under Governor Caldwell. In 1949 he was chosen First Assistant Attorney General by Richard W. Ervin and he continued in that position until his death.

He was a Rotarian, active in community and civic affairs, serving as Secretary to the Tallahassee Rotary Club and a former director. He took a prominent part in the annual United Fund campaign in Leon County, and was active for many years in various projects of The Florida Bar.

He was also a member of the Tallahassee Cotillion Club, a director of the Tallahassee Country Club, and a former member of the Suwannee River Council of the Boy Scouts of America.

His outstanding leadership and management ability in his 22 years of public service earned him the 1963 Gold Merit Award from the Associated Industries of Florida for the public employee who had contributed most to good management practices in government.

"Bob's" untimely passing leaves a void not only in the hearts of his family and friends but also in the hearts of all those persons who were privileged to know him.

His warmth and goodness, his regard for his fellowman, and the high esteem in which he was held, will truly be a memorial to his fine character.

"In one sense there is no death. The life of a soul on earth lasts beyond his departure. You will always feel that life touching yours, that voice speaking to you. . . . He lives on in your life and in the lives of all others that knew him." . . . ANGELO PATRI



In Memoriam

J. ROBERT McCLURE

J. ROBERT McCLURE

1904 - 1963

*"And the tear that we shed,
though in secret it rolls,
Shall long keep his memory green
in our souls." . . . THOMAS MOORE*

J. Robert McClure was born in Pensacola, Florida on October 17, 1904, and passed away suddenly in Tallahassee, Florida, on December 24, 1963. Immediate survivors are his widow, the former Florina Davis of Madison, Florida; two sons, J. Robert McClure, Jr., and Charles Davis McClure; and two granddaughters.

"Bob" McClure, as he was affectionately known, attended school in Pensacola and graduated from the University of Florida in 1926. He was President of Theta Chi Social Fraternity and a member of Phi Delta Phi Legal Fraternity.

Choosing law as his profession, he began his practice upon his admission to the Bar in 1939 as a member of the firm of Davis, Davis and McClure of Madison. He was a member of the Tallahassee and Florida Bar and had been admitted to practice before the Supreme Court of the United States. He also served as County Prosecutor for Madison County.

In 1943 "Bob" was appointed Executive Secretary to Spessard L. Holland, then Governor of Florida. He later served as Secretary to the State Road Board under Governor Caldwell. In 1949 he was chosen First Assistant Attorney General by Richard W. Ervin and he continued in that position until his death.

He was a Rotarian, active in community and civic affairs, serving as Secretary to the Tallahassee Rotary Club and a former director. He took a prominent part in the annual United Fund campaign in Leon County, and was active for many years in various projects of The Florida Bar.

He was also a member of the Tallahassee Cotillion Club, a director of the Tallahassee Country Club, and a former member of the Suwannee River Council of the Boy Scouts of America.

His outstanding leadership and management ability in his 22 years of public service earned him the 1963 Gold Merit Award from the Associated Industries of Florida for the public employee who had contributed most to good management practices in government.

"Bob's" untimely passing leaves a void not only in the hearts of his family and friends but also in the hearts of all those persons who were privileged to know him.

His warmth and goodness, his regard for his fellowman, and the high esteem in which he was held, will truly be a memorial to his fine character.

"In one sense there is no death. The life of a soul on earth lasts beyond his departure. You will always feel that life touching yours, that voice speaking to you. . . . He lives on in your life and in the lives of all others that knew him." . . . ANGELO PATRI

ORGANIZATION OF ATTORNEY GENERAL'S OFFICE

JAMES W. KYNES
ATTORNEY GENERAL

ROBERT J. KELLY—*Administrative*
Office Management
Personnel
Finance
Secretaries
Nat. Asso. of Attorneys Gen.
Insurance Commissioner
Treasurer

← First Assistants →

JOSEPH C. JACOBS—*Legal*
Conservation Department
Dept. of Public Safety
Game & Fish Commission
Labor Relations
Tuberculosis Board
Special Projects
Civil Litigation

GENERAL ASSIGNMENTS — ASSISTANT ATTORNEYS GENERAL

FRED M. BURNS WILLIAM PHILLIPS <i>Comptroller</i> <i>Governor</i> <i>Homestead Exemption</i> <i>Licenses</i> <i>Retirement</i> <i>Revenue Commission</i> <i>Tax Assessors</i> <i>Tax Collectors</i> <i>Tax Questions</i>	ROBERT PARKER <i>Condemnation</i> <i>Drainage Districts</i> <i>Everglades Fire Con.</i> <i>Florida Bar</i> <i>Forestry Board</i> <i>Indian Affairs</i> <i>Land Foreclosure</i> <i>Land Office</i> <i>Land, Oil, Gas & Water</i> <i>Park Board</i> <i>Trustees of Internal</i> <i>Improvement Fund</i> <i>Turnpike Authority</i>	WILSON WRIGHT JULIAN VRICELLE <i>Aviation</i> <i>Constables</i> <i>Corporations</i> <i>Elections</i> <i>Justices of Peace</i> <i>Municipalities</i> <i>Notaries Public</i> <i>Secretary of State</i> <i>Sheriffs</i> <i>Small Claims Courts</i>	RALPH ODUM <i>Board of Control</i> <i>Bd. of Education</i> <i>Education Dept.</i> <i>Co. School Bds.</i> <i>Teacher's Retirement</i>
JACK A. HARNETT <i>Agriculture Dept.</i> <i>Auditing Department</i> <i>Citrus Commission</i> <i>County Judges</i> <i>Engineers</i> <i>Milk Commission</i> <i>Purchasing Commission</i>	JAMES CARLISLE <i>Abstracts & Titles</i> <i>Flood Control</i> <i>Recreational Lands</i> <i>Securities Com.</i> <i>Watchmakers Com.</i> <i>Water Resources</i>	SAM SPECTOR <i>Alcoholic Rehab.</i> <i>Beverage Department</i> <i>Funeral Directors</i> <i>Marriage & Divorce</i> <i>Pest Control</i> <i>State Hospitals</i> <i>State Road Dept.</i>	GERALD MAGER <i>Administration Bd.</i> <i>Budget Commission</i> <i>Chiropractic Bd.</i> <i>Commissioners of</i> <i>State Institutions</i> <i>Contracts, Bldg.</i> <i>Dental Board</i> <i>Div. of Corrections</i> <i>Financial Respons.</i> <i>Fire Marshal</i> <i>Industrial Commission</i> <i>Merit System</i> <i>Medical Board</i> <i>Osteopaths</i> <i>Psychology Examiners</i> <i>Barber Board</i> <i>Hotel Commission</i>
KENNETH BALLINGER <i>Circuit Clerks</i> <i>County Clerks</i> <i>County Commissioners</i> <i>Educational TV Com.</i> <i>Nuclear Dev. Com.</i>	FRANK ORLANDO <i>Anti-Trust</i> <i>Installment Land Sales</i> <i>Pharmacy Board</i> <i>Real Estate Com.</i>	WILTON MILLER <i>Armory Board</i> <i>Civil Defense</i> <i>Development Com.</i> <i>Escheatments</i> <i>Military Affairs</i> <i>Council for Blind</i> <i>Motor Vehicle Com.</i> <i>Soil Conservation</i> <i>Veterans Affairs</i>	SCREENING COMMITTEE: ROBERT J. KELLY GERALD MAGER JOSEPH JACOBS—Chr.

MARY SCHULMAN <i>Accountancy Bd. Adoption Air Pollution Con. Anatomical Board Architects Beauty Board Board of Health Chiropody Board Crippled Children Dispensing Optician Egg Commission Harbor Masters Hypnosis Law Juvenile Courts Library Board Massage Board Medical Technology Mortgage Foreclo.</i>	Mosquito Control Naturopathic Bd. Nurses Nursing Homes Optometrist Bd. Physical Therapists Pilot Commission Veterinary Board Welfare Board Workmen's Comp.	MIAMI AREA JOSEPH NESBITT 1633 DuPont Building Miami 32, Florida <i>Comptroller General Litigation</i>
	TAMPA OFFICE	¹ The Lakeland and ² Miami Offices deal exclusively with Criminal Appeals. Any inquiry concerning other matters should be addressed to the Attorney General at the Tallahassee office in the Capitol.
	ANTHONY J. LICATA Room 306 State Office Building 800 Twiggs Street Tampa 2, Florida <i>General Litigation</i>	

SPECIAL DEPARTMENTS

CRIMINAL APPEALS DIVISION	STATUTORY REVISION	LAW ENFORCEMENT
REEVES BOWEN, <i>Director</i> GEORGE R. GEORGIEFF JAMES G. MAHORNER A. G. SPICOLA, JR. WILLIAM ROTH ROBERT CRITTENDEN ¹ ROBERT STOKES ¹ LEONARD MELLON ² VICTOR ANDREEVSKY ²	C. TOM HENDERSON, <i>Director</i> SALLYE C. FLOURNOY ROSE D. KITCHEN <i>Biennial Report Bill Drafting Bulletins Council of State Governments House and Senate Journals Index and Tables Publication of Official Florida Statutes</i>	LEONARD R. MELLON ² , <i>Director</i> MARTIN DARDIS, <i>Chief Investigator</i> JOHN BITOFF KENNETH SKOTTEGARD WILLIAM CROSS <i>Bookie Bill Narcotics Racing Commission Railroad & Public Utilities Com.</i>
<i>Appellate Courts County Solicitors Criminal Appeals Criminal Courts Extradition Habeas Corpus Pardon Board Parole Commission Prosecuting Attorneys State Attorneys Uniform Support of Dependents</i>	¹ LAKELAND OFFICE: State Office Building 1105 East Memorial Blvd. Lakeland, Florida Phone—MUTual 2-8353	² MIAMI OFFICE: State Office Building 1350 N. W. 12th Avenue Miami 36, Florida Phone—FRanklin 9-3636

ATTORNEY GENERAL'S OFFICE

LEGAL DEPARTMENT

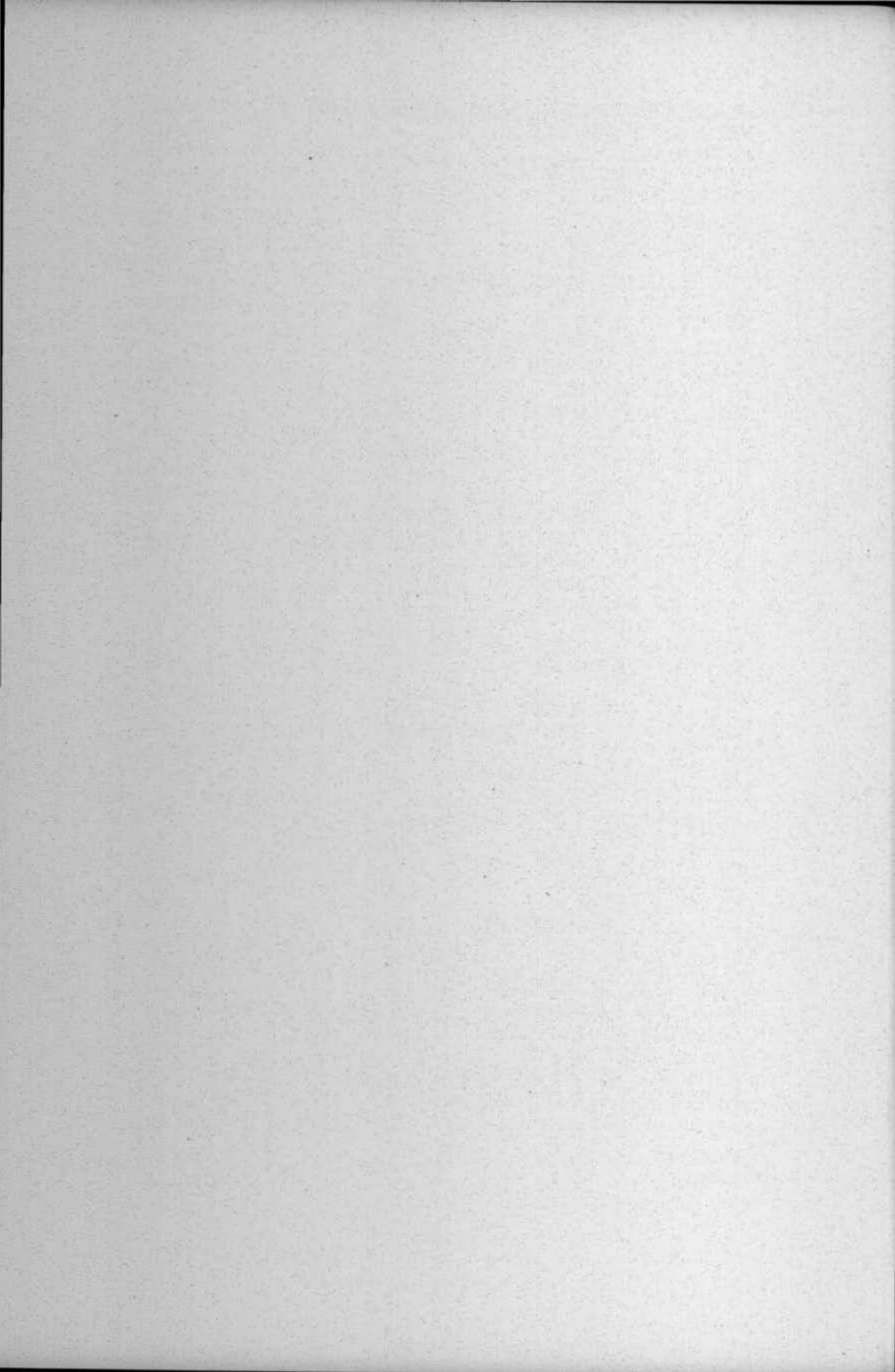
JAMES W. KYNES	Attorney General
ROBERT J. KELLY	First Assistant
JOSEPH C. JACOBS	First Assistant
VICTOR ANDREEVSKY (Miami Office)	Assistant
KENNETH BALLINGER	Assistant
REEVES BOWEN (Chief of Criminal Appeals Division)	Assistant
FRED M. BURNS	Assistant
JAMES CARLISLE	Assistant
ROBERT R. CRITTENDEN (Lakeland Office)	Assistant
GEORGE R. GEORGIEFF	Assistant
JACK HARNETT	Assistant
*EDWARD S. JAFFRY	Assistant
ANTHONY J. LICATA (Tampa Office)	Assistant
GERALD MAGER	Assistant
JAMES G. MAHORNER	Assistant
*JOSEPH McCLUNG	Assistant
LEONARD R. MELLON (Chief of Enforcement Division) (Miami Office)	Assistant
*WILTON MILLER	Assistant
JOSEPH NESBITT (Miami Area)	Assistant
*B. CLARKE NICHOLS	Assistant
RALPH E. ODUM	Assistant
FRANK ORLANDO	Assistant
ROBERT C. PARKER	Assistant
MARY SCHULMAN	Assistant
SAM SPECTOR	Assistant
*A. G. SPICOLA	Assistant
ROBERT STOKES (Lakeland Office)	Assistant
*SIDNEY J. WHITE	Assistant
WILSON W. WRIGHT	Assistant
*PHILIP KNIGHT	Special Assistant
WILLIAM PHILLIPS	Special Assistant
WILLIAM ROTH	Special Assistant
JULIAN VRICELLE	Special Assistant
*LORNA D. ALLEN	Secretary to Attorney General
BETTY F. EPPES	Executive Secretary
LILLIAN S. RYDER	Secretary
ELIZABETH M. GENTRY	Secretary
BESSIE MARY ALLEN	Secretary
HELEN M. BENNETT (Miami Office)	Secretary
WINIFRED K. BEST	Bookkeeper-Secretary

*Resigned

JEANETTE BROWN (Miami Office)	Secretary
VERNA T. CATLETT	Secretary
JUNE DAVIS	Secretary
PATSY FAIRCLOTH	Secretary
*PEGGY R. FOGLE	Secretary
*MAUDIE E. HART	Secretary
*SONDRA HASKIN	Secretary
*GLADYS KIMBRELL	Secretary
*JEWELL KIMMONS (Miami Office)	Secretary
NINA LEE KINSEY	Secretary
BETTY B. KIRBY	Secretary
MELDA KIRKLAND	Secretary
*CAROLYN LAMBERT	Secretary
MOZELLE MARIS	Secretary
IRIS Y. McDOUGALD	Secretary
BESS MILES	Secretary
KEATH MITCHELL (Miami Office)	Secretary
BETSY NATION	Secretary
FRAN POPPELL	Secretary
MARY FRANCES PURVIS (Lakeland Office)	Secretary
MARGARET H. REKOW (Lakeland Office)	Secretary
*PATRICIA W. RICKLES	Secretary
*MARSHA C. ROBERTS	Secretary
*MARTHA ROBERTS	Secretary
SARAH SIEPEL	Secretary
MARTHA G. SMITH	Secretary
*KAREN STRICKLAND	Secretary
SUE TULLY	Secretary
LILLIAN H. WALKER	Secretary
*VIRGINIA WILSON (Miami Office)	Receptionist-Secretary
BETTY HALL YON	Secretary
MARGUERITE E. KEEGAN	File Clerk
AUGUSTA D. TURNLEY	Assistant File Clerk
DORA BELLE BROOKS	Receptionist
JOHN BITOFF	Investigator
WILLIAM M. CROSS	Investigator
MARTIN DARDIS	Investigator
ED McCOLLUM	Investigator
KENNETH SKOTTEGARD	Investigator
**LIDIE E. MOSS	P. B. X. Operator
JUDY SEAY	P. B. X. Operator
HORTENSE K. WELLS	Librarian
MICHAEL PATRONIS	Machine Room Supervisor
TIMOTHY E. GAINOUS	Janitor
DAN J. STARKS	Janitor
HATTIE HOLLINGSWORTH	Maid
RUTH N. LANDERS	Maid

*Resigned

**Retired



ATTORNEY GENERAL'S OFFICE

STATUTORY REVISION DEPARTMENT

CHARLES TOM HENDERSON..... Director of Statutory
Revision and Bill
Drafting, Assistant
Attorney General

SALLYE C. FLOURNOY..... Editor, Assistant Attorney General

ROSE D. KITCHEN..... Indexer, Editor, Assistant Attorney General

JEWELL R. ROEMER..... Editor, Secretary

HILDA F. LIPSEY..... Secretary to the Director

MARY O'Q. POMEROY..... Secretary

HILDRED Y. CASEY..... Secretary

VIVIAN J. GOULD..... Secretary

DOROTHY B. KEHOE..... Secretary

JEAN T. LaBARBERA..... Secretary

KITTY C. GLENN..... Secretary

DOROTHY M. STARK..... Copy Editor

LILYAN D. GARRISON..... Copy Editor

GREGGIE M. HULL..... Proofreader

CAROLYN M. ERVIN..... Proofreader

CATHERINE COMISKEY..... Clerk

BETTY B. HAYWARD..... Clerk

EXPLANATION

This report contains copies of a majority of the opinions rendered by this office during the past two years. The opinions that are omitted are of a purely local nature or application. It has been necessary to eliminate some material in the interest of economy since the number of opinions issued has increased beyond all expectations. A copy of any opinion omitted from this report is on file in this office. For omitted opinions by number and subject matter, see index and table of omitted opinions listed immediately preceding the alphabetical index.

BIENNIAL REPORT
of the
ATTORNEY GENERAL
State of Florida

January 1, 1963, through December 31, 1964

063-1—January 1, 1963

TAXATION

**INTANGIBLE PERSONAL PROPERTY TAXES—RESIDENT
PERSONAL REPRESENTATIVE OF NONRESIDENT'S
ESTATE**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is the intangible personal property of a nonresident resident's estate subject to taxation in this state when a resident of this state is appointed and qualifies as the personal representative of the said estate?

In *State v. Beardsley*, 77 Fla. 803, 82 So. 794, text 796, the court stated that "the weight of authority is that such (intangible personal property) property, in the hands of an administrator or executor is taxable at the domicile of the decedent or the place of granting of letters of administration, which is usually the place of the domicile of the decedent . . . 'but it is otherwise where the property passes into the hands of a trustee. It is, as a general rule, taxable at his residence or domicile.'" This appears to answer the above question in the negative. To the same effect see also 84 C. J. S. 242, §119, holding that generally the domicile of the decedent determines the situs of intangible personal property for purposes of taxation; but also stating that according to some authorities, after administration has been granted and the personal representative has qualified the situs of such personal property is at the domicile of the personal representative. This appears to be a minority rule not generally followed in this state.

However, we gather from the authorities that under the laws of some states or countries the title of the intangibles of a decedent when vesting in the personal representative, instead of vesting as of the place of administration, will vest as of the place of residence of the personal representative. Therefore, where it is made to appear that under the laws of the state of administration of an estate title to the intangibles of the estate vests in the personal representative as of his residence and not as of the place of administration, such property will be taxable in this state, but not otherwise. Only when the laws of the other state so expressly provide may the property be taxed in Florida.

063-2—January 9, 1963

COUNTY SCHOOL SYSTEM

INSTRUCTIONAL PERSONNEL—AWARDING OF COMPETENCE AWARDS—METHOD OF DETERMINING— §236.021, F. S.

To: Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee

QUESTIONS:

1. What is the latest date by which teachers must have taken the national teacher examination and have made the qualifying score of 600, or equivalent score on a similar examination approved by the state board of education, and have filed the score in the county superintendent's office, in order to qualify for a competence award disbursement of \$400 during the current school fiscal year 1962-63?

2. How should the maximum number of competence awards to be paid this year (1962-63) in a county be computed?

Section 236.021, F. S., provides:

Competence awards; method of determining; source of funds; etc.—

(1) There is hereby created a program of competence awards for teachers and other instructional personnel employed in the public schools of this state. The first year of making awards shall begin July 1, 1962, and the evaluations shall be made for the year beginning July 1, 1961. The purpose of these awards is to recognize and to provide financial compensation for outstanding contributions to the process of learning and for exceptional results in teaching, and it is the intent of the legislature that these awards shall be used to retain in the public school system of the state the services of its ablest instructional personnel. The state board of education shall prescribe such administrative regulations as may be necessary to carry out the intent and provisions of this section.

(2) These awards shall be payable entirely from state funds and shall be in addition to all other salary allotments and requirements; and nothing in this section shall be construed as prohibiting or discouraging any county from paying other increments from funds or from maintaining a sound salary schedule.

(3) Any person eligible for selection to receive a competence award and who elects to become eligible shall meet the following requirements:

(a) He shall have made a score on the common examination of the national teacher examinations of at least 600 or an equivalent score on an equivalent comprehensive examination approved by the state board of education; but no examination or score shall be approved which shall be lower than the score made by the 50th percentile of college seniors on a national basis on such examination. Whenever national examinations and national norms are not available in any field of instruction the state board of education shall prescribe a state examination of equivalent caliber.

(b) He shall be evaluated annually by his principal or other superior as among the most effective teachers in the county in the year preceding the year for which the awards are to be made, and the evaluation shall be reviewed by the superintendent and the county school board. The evaluation of teaching effectiveness shall be based on but not limited to mastery of the subjects taught, skill in imparting knowledge and understanding thereof, and ability to arouse the interest of pupils and stimulate their enthusiasm for learning. The evaluation of effectiveness as a principal shall be based primarily on his ability as a leader, organizer, administrator and contributor to the progress of instruction and of his school. In making these evaluations the school authorities shall consider the results of pupil testing programs, the progress of the pupils, the opinions of other teachers and of lay citizens, and other pertinent data.

(4) Each person on the instructional staff who meets the requirements of subsection (3) and who is so evaluated in the year preceding award that he ranks among the highest 30% of all the teachers in his county in the year in which the awards are made shall be paid a competence award of \$400 if he continues his teaching service in the public school system of the county.

This act provides that "... The first year of making awards shall begin July 1, 1962, and the evaluations shall be made for the year beginning July 1, 1961."

"(3) Any person eligible for selection to receive a competence award and who elects to become eligible shall meet the following requirements:

"(a) He shall have made a score on the common examination of the national teachers examination of at least 600 or an equivalent score on an equivalent comprehensive examination

"(b) He shall be evaluated annually by his principal or other superior as among the most effective teachers in the county in the year preceding the year for which the awards are to be made. . . .

"(4) Each person on the instructional staff who meets the requirements of subsection (3) and who is so evaluated in the year preceding award that he ranks among the highest 30% of all the teachers in his county *in the year in which the awards are made* shall be paid a competence award of \$400 if he continues his teaching service in the public school system of the county." (Emphasis supplied.)

AS TO QUESTION 1:

The act contemplates that in order to qualify for a competence award the teacher must have met two requirements: First, he must have scored at least 600 on the national teacher examination (or a comparable score on an equivalent examination as provided) during the school year preceding the year in which the awards are to be made; and, second, he must have been evaluated by his principal or other superior as among the most effective teachers in the county during the same period of time.

It would appear, therefore, that in order for a teacher to be eligible for a competence award during the current school fiscal year 1962-63 he must have taken the required examination and have filed his qualifying score with the county school superintendent not later than the close of the 1961-62 school fiscal year (June 30, 1962).

AS TO QUESTION 2:

Although the act appears to be somewhat ambiguous, it provides that the teachers who receive the awards shall rank among the *highest 30% of all the teachers in his county in the year in which the awards are made.*

Apparently the legislature intended that all regular, full time teachers under contract who are employed *during the year in which the awards are made* should be counted in computing the number of awards even though some of them may not have taken the required examination or made the required minimum score thereon and therefore could not be evaluated for an award.

It is my opinion, therefore, that each teacher who has met the two necessary requirements for a competence award by June 30, 1962, and who is still employed in the county during the school year 1962-63 and who ranks among the highest 30% *of all the regular full time teachers* in the county during the 1962-63 school year shall be given an award as provided by the act.

For example, if a county has 1,000 regular full time teachers during the 1962-63 school year, 30%, or 300, would be eligible for an award if they taught in the same county during the 1961-62 school year, had made the necessary test score by the end of the 1961-62 school year and had been evaluated by their superiors as being among the most effective teachers in the county during the school year 1961-62.

If more than 300 teachers qualified, presumably the 30% making the highest test scores would receive an award.

If less than 300 teachers qualified for an award, all teachers who had met the requirements provided in §236.021 (3) (a) and (b), would receive an award.

The state board of education has authority by appropriate regulations to fix a reasonable date for the computation of the exact number of teachers employed in the counties and to otherwise implement the act consistent with its provisions.

063-3—January 10, 1963

TAXATION

INTANGIBLE PERSONAL PROPERTY TAXES—CEMETERY CARE AND MAINTENANCE TRUST FUND—§§559.43, 608.60, 199.11, 199.02; CHS. 518, 199, F. S.; §1, ART. IX; §16, ART. XVI, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are trust funds established under and pursuant to §§559.43 and 608.60, F. S., to provide for the care and maintenance of cemeteries, subject to intangible personal property taxes under §199.11, F. S.?

Said §§559.43 and 608.60, F. S., contain mandatory provisions requiring the establishment of trust funds to secure the future care and maintenance of the cemeteries to which applicable. Under each of said sections, persons, firms or corporations selling cemetery lots and burial rights in the cemetery are required to set aside and deposit in trust the specified portions of the sales price or consideration paid for such burial lots or burial rights sold. Section 559.43 provides that "there shall be set aside and deposited in the care and maintenance trust fund by the cemetery company" the percentages therein men-

tioned for all burial lots and burial rights sold. This requirement is mandatory in form. Section 608.60 provides that "no cemetery company shall be permitted to establish, or operate if already established, a public cemetery for private gain or profit without providing for the future care and maintenance of such cemetery."

Under §559.43, the funds provided for the care and maintenance of the cemetery from the sources therein provided, are set aside and deposited in a care and maintenance trust fund. The said care and maintenance trust fund "shall be invested and reinvested by the trustee under the provisions of Chapter 518," F. S. The expenses of the care and maintenance are payable from the income of the trust fund. Under §608.60 a similar care and maintenance trust fund is created and established from specified percentages of the consideration paid for burial lots and burial rights. These funds must also be invested and reinvested by the trustee as provided in and by said Ch. 518, F. S. These trust funds are designed to provide for the future care and maintenance of the cemetery in question. It seems clear from said §§559.43 and 608.60, F. S., that the statutes contemplate the general care and maintenance of the cemetery as a whole, or sections thereof as a whole, and not the care of specific or particular burial lots or burial facilities. The trust is not for the care and maintenance of specific and particular burial lots and facilities, but of the cemetery or some major portion thereof as a whole.

These trust funds are intangible personal property, and as such subject to taxation under Ch. 199, F. S., unless entitled to exemption from taxation. Exemptions for intangible personal properties from taxation under Ch. 199, F. S., are provided by §199.02(5), F. S., which provides that "intangible personal property belonging to the state, or any political subdivision thereof, and intangible personal property belonging to any religious, charitable, benevolent or educational association shall be exempt from" intangible personal property taxes. The supreme court of this state has held that constitutional provisions, such as §1, Art. IX, and §16, Art. XVI, State Const., relating to exemption from ad valorem taxes, are limitations upon legislative power to exempt from taxation any class or classes of property other than those classes mentioned in said sections and articles of the Florida constitution. (*L. Maxcy, Inc. v. Fed. Land Bank*, 111 Fla. 116, 150 So. 248, text 250; *State v. St. John*, 143 Fla. 544, 197, So. 131, text 134; and *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304).

Said §1, Art. IX, and §16, Art. XVI, State Const., limit tax exemption provided by statute to properties held and used exclusively for some religious, scientific, municipal, educational, literary or charitable purposes. We must, therefore, read and construe the exemption provisions in said §199.02(5), F. S., with and subject to the limitations of said constitutional provisions. Therefore, only that intangible personal property of religious, charitable, benevolent or educational institutions, as is used for religious, scientific, municipal, educational, literary or charitable purposes may be granted tax exemption under said subsection (5).

Trusts set up to provide care and maintenance of graves and burial lots have been held valid (see 89 C. J. S. 742, §25, note 63). As a general rule cemeteries and burial grounds, *open and in use as such*, are entitled to exemption from ad valorem taxation. (84 C. J. S. 597, et seq., §292). As a general rule a gift for the care, maintenance and improvement of a public or semi-public burial ground, has been held charitable in nature (14 C. J. S. 442-444, §14); however, "in the absence of a statute, a trust for the care and upkeep of a private burial

lot, or particular graves . . . is not valid as a charitable gift, although a trust of this kind may be sustained as a private trust." In *Hopkins v. Grimshaw*, 165 U. S. 342, 17 S. Ct. 401, 41 L. Ed. 739, text 743, the court expressed doubt that a conveyance to establish a cemetery for use by a society of persons would constitute a public charitable use, evidently viewing a use by a limited number of persons not a public use. A trust set up for the benefit of a definite portion of the public at large has been held to be a public trust (*Y.W.C.A. v. Portsmouth*, 89 N. H. 40, 192 A. 617; *Powers v. First Nat'l Bank, Tex.* Civ. App., 137 S. W. 2d 839). Trusts set up for the use of church congregations have been held to be public trusts (*Harger v. Barrett*, 319 Mo. 633, 5 S. W. 2d 1100; *Gagnon v. Wellman*, 78 N. H. 327, 99 A. 786). A cemetery provided for the use of an indefinite number of the public has been held to be a public charity (*Newton v. Newton Burial Park*, 326 Mo. 901, 34 S. W. 2d 118).

From the above and foregoing we conclude that a fund provided for the care and maintenance of a particular burial lot or plot, not being of a public nature would not constitute or be within the exemption provisions of §199.02(5), F. S. However, where a general fund is provided for the perpetual care of a cemetery, although derived from the consideration paid for individual burial lots and plots, without regard to the individual burial lots or plots, such general fund will constitute a public charity designed for the care and maintenance of the cemetery mentioned.

The above stated question is answered in the negative; provided the trust fund is provided for the care and maintenance of the cemetery generally, and not for the care and maintenance of particular graves, lots or tracts in the cemetery.

063-5—January 21, 1963

TAXATION

**TAX EXEMPTION—HOME MAINTAINED FOR RETIRED
METHODIST MINISTERS—CHS. 3662, 1885, 1713, 1869,
20858, 1941, LAWS OF FLORIDA; §192.06, F. S.; §1,
ART. IX, §16, ART. XVI, STATE CONST.**

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are dwelling facilities owned and maintained by the trustees of the preachers' relief fund of the Methodist church, a nonprofit corporation, in connection with the retirement of Methodist preachers, and other religious workers, entitled to tax exemption in this state?

The trustees of the preachers' relief fund of the Florida conference of the Methodist church south was incorporated as a body corporate and politic by Ch. 3662, 1885. The purposes and objects of this corporation were to create and manage a fund to be applied for the better support of aged and worn-out preachers and widows of preachers. Under this act the trustees were authorized to establish prudent regulations from time to time under the general direction of the said conference. The name of this corporation was changed to the trustees of the preachers' fund of the Florida conference of the Methodist church, by Ch. 20858, 1941. Section 3 of said 1885 act provides that "all property and funds held by said trustees for said object shall be free from taxation." This section was subject to contrary provisions

in the Florida constitution of 1885, which, under ordinance no. 1, of the constitutional convention of 1885, became effective on Jan. 1, 1887, if any.

Under §1, Art. IX, and §16, Art. XVI, of the said Florida constitution, the power and authority of the legislature to grant tax exemption, including prior statutes and laws, beginning Jan. 1, 1887, became limited to property held and used primarily for religious, scientific, educational, literary or charitable purposes. (*L. Maxcy, Inc. v. Federal Land Bank*, 111 Fla. 116, 150 So. 248, text 250; *State v. St. John*, 143 Fla. 544, 197 So. 131, text 134; and *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304). The said constitutional provisions limit the exemption provided in said §3, Ch. 3662, 1885, to property held and used for religious, scientific, educational, literary or charitable purposes in accordance with the said constitutional provisions. The fact that the property in question is owned and held by the trustees of the preachers' relief fund of the Methodist church, does not of and within itself entitle it to tax exemption when used for *other than* religious, scientific, educational, literary or charitable purposes. Unless held and used primarily for religious, scientific, educational, literary or charitable purposes, property may not be exempted from taxation.

"Generally the exemption does not extend to property used primarily for residential purposes, (such as parsonages) unless otherwise provided by statute." (84 C. J. S. 595, §291). However, under §192.06 (4), F. S., "every parsonage" is exempted from taxation. The term "parsonage," as used in tax exemption laws, has been defined as a house set apart for the residence of the minister of the church owning such parsonage. (84 C. J. S. 587, §289). It is the residence furnished by a church for the use of its minister (76 C. J. S. 802, §44). In *Worcester Dist., Stewards, etc. v. Assessor of Worcester*, 321 Mass. 482, 73 N. E. 2d 898, the Massachusetts court held that under the Massachusetts statute parsonage exemptions were limited to particular churches and not to general church organizations. The Florida statute provides exemptions to houses of public worship and the lands upon which located, and the church pews, steps and furniture and to "every parsonage and all burying grounds not owned or held by individuals or corporations for speculative purposes, tombs and right of burial." Chapter 1713, 1869, provided tax exemption for "all houses of public worship, and the lots on which they are situated, and the pews or slips and furniture therein; every parsonage, and all burial grounds, tombs and rights of burial; but any building being a house of public worship, which shall be rented or hired for any other purpose except for schools, shall be taxed the same as other property." Present §192.06 (4), is substantially the same as the above quoted language from the 1869 act.

We are inclined to construe the reference to burial grounds, tombs and rights of burial, as used in the 1869 act, and to "all burying grounds" as used in said §192.06(4), *supra*, to extend to and include burying grounds separate and apart from church houses and edifices. Taking into consideration the punctuation used in the 1869 act, as well as the position of the word "parsonage" in said §192.06(4), F. S., we are inclined to the view that the term "parsonage" is unconnected with the church house or edifice, and may be located elsewhere than on the church grounds. Neither are we inclined to construe the said statute as limiting the term "parsonage" to the house or dwelling used by the minister assigned to a particular church congregation, but extends to the house or dwelling used by church bishops, superinten-

dents, presiding elders, and other ordained ministers holding positions of superintendence in duly organized religious bodies.

Whether or not dwellings and similar facilities belonging to religious organizations and churches, used as housing for retired ministers, are or are not being used for religious, charitable or other purpose mentioned in §1, Art. IX, and §16, Art. XVI, State Const., is a question of fact to be determined from all applicable facts and circumstances. In this connection reference is made to 14 C. J. S. 451, §18, where it is stated that "while the rule is otherwise as to a personal gift to or for a minister, gifts for a minister or ministers as such, or for the maintenance of preaching, are for a valid charitable purpose. Likewise, a gift for the support of a sermon or a course of sermons is one for a charitable purpose. A devise to a religious group to be used for the support of old and needy ministers of a certain denomination is for a charitable purpose."

The above stated question is answered in the affirmative if the use is found to be for some religious, charitable, or other purpose mentioned in §1, Art. IX, and §16, Art. XVI, State Const., under the rule as discussed in this opinion, otherwise not.

063-6—January 21, 1963

TAXATION

INTANGIBLE PERSONAL PROPERTY TAXES—SURETY BOND TO SECURE PERFORMANCE OF OBLIGATION— CHS. 199 and 177, §§199.02, 199.05, 1.01(10), F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are surety or guarantee bonds held by the payee therein named, or by the beneficiary thereunder, securing or guaranteeing the performance of specified acts or things, intangible personal property subject to taxation under Ch. 199, F. S.?

The city of Lighthouse Point in Broward county, as a condition precedent to its approval of a proposed subdivision plat, under and pursuant to Ch. 177, F. S., or other like or similar law, required that the developer of the subdivision file with the said city a subdivision improvement bond, underwriting or guaranteeing the completion of the roads, streets, paving and drainage work required by the plans for the subdivision to be developed in accordance with the subdivision map or plat to be filed and approved under and pursuant to said Ch. 177. The condition of this bond was that the subdivider would complete the roads, streets, paving and drainage, to be done and performed as aforesaid, or cause the same to be completed, within one year from and after Feb. 27, 1962. This bond was without corporate or personal surety; however, the Venetian Isles Shopping Center Corp., a Florida corporation, on or about Feb. 27, 1962, made and delivered to the said city of Lighthouse Point a mortgage, encumbering blocks one and six of the replat of a part of the amended plat of Venetian Isles shopping center, securing compliance of the said obligation to construct and complete the said roads, streets, paving and drainage work aforesaid in accordance with the maps, plats and plans aforesaid and with the terms and conditions of the above mentioned subdivision improvement bond. The said mortgage provides that "no note is given in connection with this mortgage. It is the intention of

the mortgagor and mortgagee that the aforementioned subdivision improvement bond shall be the only obligation secured by this mortgage."

Under the terms of the defeasance clause in the said subdivision improvement bond, if the shopping center corporation "shall complete, or cause to be completed, said work, within one year from . . . (Feb. 27, 1962) . . . and pay all costs . . ." then the obligation of the said bond becomes void and of no further force and effect. The obligation of the bondsman is a conditional one dependent upon a breach of the agreement to complete the construction of the roads, streets, paving and drainage work; not until there is a breach of this obligation will there be anything due and payable under the said bond. These obligations are carried into the mortgage given to secure the performance of the obligations of the said bond and under the same conditions. There is a material difference between a bond for the payment of a specified sum at all events; and a bond dependent upon a defeasance clause such as the one before us. Under the first type of bond the principal of the bond matures and is payable at all events; while in the other the principal may never mature and be payable, being dependent upon the compliance with the obligations under another contract.

Such a surety or guarantee bond is subject to classification as an intangible, and possibly a class "B" intangible under §199.02, F. S. Section 199.05, F. S., requires that "the tax assessor shall assess all intangible personal property at its full cash value." Such a surety or guarantee bond seems to be in the nature of a secondary obligation, maturing and becoming payable only after there has been a default in the carrying out of the primary obligation. The obligation under such a bond is conditional and inchoate unless and until there has been a breach of the conditions of the said bond. Under the defeasance in the bond nothing will be due thereunder unless and until there is a failure to have the improvement completed within the time specified.

A mortgage, being merely a lien under the statutes of Florida, is not an intangible within the purview of Ch. 199, F. S., within itself; the intangible being the debt or obligation secured by the mortgage whether expressed within the mortgage itself or by a separate note or other document. Even should we deem the mortgage herein considered as an intangible it would be exempt from intangible personal property taxes under the provision in §199.02(5), F. S., providing that "intangible personal property belonging to the state, or any political subdivision thereof," the city being a political subdivision within the purview of the above quoted phrase in the light of §1.01(10), F. S.

We do not think that surety and guarantee bonds, given to secure the performance of an obligation by another, have any taxable value under Ch. 199, F. S., unless and until there has been a breach of the obligation secured by them, and then only to the extent of the damages incurred, but not exceeding the principal of the said bond.

063-7—January 23, 1963

TAXATION

DOCUMENTARY STAMP TAXES—STOCK DIVIDENDS AND
STOCK SPLITS—ORIGINAL ISSUES—§201.05, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Are certificates of corporate stock, issued as

stock dividends to existing stockholders, an original issue of stock subject to the excise tax imposed by §201.05, F. S.?

2. Are certificates of corporate stock, issued in connection with a stock split or similar transaction, an original issue of stock subject to the excise tax imposed by said §201.05, F. S.?

Said §201.05, F. S., provides that "on each *original* issue, whether organization or reorganization, of certificates of stock issued in the state, or profits, or of interest in property or accumulations, by any corporation, on each \$100 of face value, or fraction thereof, the tax shall be 10¢; . . ." (Emphasis supplied.) "No par" stock is taxed at the same rate on the actual value thereof. Section 4301, title 26, U. S. code, provides that "there shall be issued a tax on each original issue of shares or certificates of stock, issued by a corporation, whether on organization or reorganization," at the rates set out in said section. It, therefore, appears that the Florida statute and the federal statute are in substance the same.

Federal tax regulation §43.4301-2, provides that "the following are examples of issues subject to the tax (imposed by §4301, title 26 U. S. code) . . . (a) (4) Stock issued as a dividend."

In *U. S. v. Pure Oil Co.*, CCA 7th, 135 Fed. 2d 578, text 579, the court held that *additional* shares of stock issued in satisfaction of unpaid dividends previously allowed, which increased the amount of outstanding stock as well as the number of shares, were taxable as an original issue of stock. In *Iron Firemen Mfg. Co. v. U. S.*, CCA 9th, 106 Fed. 2d 831, text 832, a *stock dividend* was held to be an *original issue* of stock and taxable under the federal statutes. In *Southern Pacific Co. v. Berliner*, CCA 9th, 176 Fed. 2d 671 (affirming 76 Fed. Supp. 696), a surplus of \$6,304,845 was added to the capital account, increasing the same by that amount, and shares of stock representing the increased amount were issued. The court deemed the said \$6,304,845 as being in the nature of a stock and subject to taxation as an original issue of stock. The courts in *Allied Chem. and Dye Corp. v. McMahon*, 156 Fed. Supp. 275 (affirmed 253 Fed. 2d 663), and *U. S. Steel Corp. v. U. S., Ct. Cl.*, 142 Fed. Supp. 948 (certiorari denied), reached substantially the same conclusion; that the issuance of corporate stock increasing the capital stock account, amounts to an original issue under the documentary stamp taxing statute.

"In its ordinary accepted meaning, a stock dividend is a dividend payable in stock instead of cash, the declaration of which involves the creation and issuing of new stock to be distributed pro rata to the stockholders as evidence of the contemporaneous transfer of an equivalent amount of the surplus earnings or profit to the capital fund of the corporation." (13 Am. Jur. 642, §648). In *People v. Gilchrist*, 243 N. Y. 173, 153 N. E. 39, the court said that "when a dividend is paid in cash, the ownership of the corporate assets is changed; the company owns less and the stockholder owns more, or something essentially different, though its value be no greater. Upon the distribution of a stock dividend, ownership of the assets is precisely as it was. A stock dividend does not distribute property, but simply dilutes the shares as they existed before." Property of the corporation has been transferred from the surplus and undivided profits account, thereby reducing it in amount, to the capital stock account, thereby increasing it in amount.

Where a corporation issues four shares of the par value of \$25, for and in lieu of its \$100 par value shares, of the same class, there

has been no increase in its stock account, such transaction is not an original issue of corporate stock and is not subject to documentary stamp taxes (*Standard Mfg. Co. v. Heiner*, DC Pa., 300 Fed. 252; *Turnbull Steel Co. v. Routzahn*, DC Ohio, 292 Fed. 1009). See also *Amer. Laundry Mach. Co. v. Dean*, DC Ohio, 292 Fed. 620, where five \$20 shares were exchanged for \$100 shares, which were held not to represent an original issue of stock within the stamp taxing statute of the U. S. "An exchange of one kind of stock for another kind of stock, or a 'split up' of stock, entailing no essential change in the capital or assets of the corporation does not constitute an original issue." (47 C. J. S. 786, §547).

Question 1 is answered in the affirmative. A comparison of the letter from Farish & Farish, of Feb. 9, 1962, to the Florida Nat'l Bank & Trust Co., with the other correspondence in the file handed us with the request for opinion, leads us to wonder whether a stock dividend or a split up of existing stock is involved.

Question 2 is answered in the negative, where there is no change in the total capital account.

063-8—January 25, 1963

TAXATION

HOMESTEAD TAX EXEMPTION; MENTALLY INCOMPETENT OWNER—§§192.141, F. S.; §7, ART. X, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Does a mentally incompetent homesteader in this state lose his right to tax exemption upon being adjudged a mentally incompetent and committed to a state hospital and his homestead being rented to another by his guardian?

As to homesteads generally, the detention of the lunatic owner in an asylum in not a voluntary abandonment of his homestead by him, so that his homestead will become liable for his debts and obligations. (*Lewis v. Lewis*, 201 Ala. 112, 77 So. 406, text 413; *National Loan and Building Assoc. v. Maloney*, 22 Ky. L. 1094, 60 S. W. 12, text 13; *Holburn v. Pfannmiller's Administrator*, 114 Ky. 831, 71 S. W. 940, text 941; *Eastern Kentucky Asylum v. Cottle*, 143 Ky. 719, 137 S. W. 235; *Alton Mercantile Co. v. Spindel*, 42 Okla. 210, 140 P. 1168, text 1169 and 1170; *Hinds v. Buck*, 177 Tenn. 444, 150 S. W. 2d 1071, text 1072; *Flynn v. Hancock*, 35 Tex. Civ. App. 395, 80 S. W. 245, text 246; *Curry v. Wilson*, 45 Wash., 19, 87 P. 1065, text 1067).

Florida courts have held that a temporary absence from one's homestead will not defeat his right to homestead tax exemption (*Jacksonville v. Bailey*, 159 Fla. 11, 30 So. 2d 529; *L'Engle v. Forbes*, Fla., 81 So. 2d 214; *Poppell v. Padrick*, Fla. App., 117 So. 2d 435). In this connection see also *Marsh v. Hartley*, Fla. App. 34, also relating to abandonment of homesteads generally. In *McCullough v. Forbes*, Fla., 47 So. 2d 780, it appears, from the dissenting opinion, that a widow had reached the age of 86 years, and that her health had so deteriorated that constant nursing care was necessary, so that the chances of her being able to return and further reside in her home were slight and unlikely. The majority of the court (4 members) by per curiam opinion held that an abandonment of her homestead was indicated, the remaining members of the court (3 members) held that there had

been no abandonment of the homestead. We wonder what the court's conclusion would have been had the homesteader been half the age above stated.

These observations and authorities evidence the rule that the commitment of the homesteader to an institution, as an incompetent, will not of itself constitute an abandonment of his homestead rights. This rule is applicable to homestead tax exemptions under §7, Art. X, of the Florida Constitution, except to the extent it may have been changed by §192.141, F. S. (derived from Chapter 59-270, Acts of 1959), which section, in so far as here material, provides that "*the rental of an entire dwelling* previously claimed to be a homestead for tax purposes shall constitute the abandonment of said dwelling as a homestead and said abandonment shall continue until such dwelling is physically occupied by the owner thereof. . . ." (Emphasis supplied.) Section 7, Art. X, of the State Const., which established homestead tax exemption rights in this state, provides in part that "the legislature may prescribe appropriate and reasonable laws regulating the manner of establishing the right to said (homestead tax) exemption." Whether or not said §192.141, F. S., is or is not a law regulating the manner of establishing the right to homestead tax exemption, primarily involves the construction of the above quoted language from §7, Art. X, of the State Const., which involves a constitutional question, which this office has consistently left to the courts.

We must also presume that a leasing of a ward's property by his legally appointed guardian is in law a leasing by the ward and within the purview of said §192.141, F. S. This answers the above stated question in the affirmative, when the homestead property is being rented by the guardian, in accordance with said §192.141, that is "*the rental of an entire dwelling* previously claimed to be a homestead . . ." (Emphasis supplied.) The rule announced in opinion 048-153, of May 13, 1948 (1947-1948 AGO 194 and 195) was changed by said §192.141.

063-9—January 25, 1963

TAXATION

HOMESTEAD TAX EXEMPTIONS—CLAIMS BY BOTH HUSBAND AND WIFE IN DIFFERENT COUNTIES— §7, ART. X, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

When may a husband, owning a dwelling house in one county, and a wife, owning a dwelling house in another county, claim separate homestead tax exemptions on their said dwelling houses?

"The general rule is that the domicile of the wife is that of her husband, and . . . the operation of this rule ordinarily is not affected by the fact that the wife is living apart from her husband in the absence of a judicial decree of separation or divorce, and that a wife who has left her husband and is living apart from him without just cause can acquire no separate domicile of her own." (Minick v. Minick, 111 Fla. 469, 149 So. 483, text 488; and to the same effect see also Herron v. Passailaigue, 92 Fla. 818, 110 So. 539, text 542; Bowmall v. Bowmall, 127 Fla. 747, 174 So. 14, text 17; and Merritt v. Merritt, Fla., 55 So. 2d 735, text 737). "While a wife may, in a proper and necessary case, acquire a separate domicile from that of her husband"

for some purposes, "the general rule is that the domicile of the wife is that of the husband in the absence of a judicial decree of separation or divorce, whether they are living together or apart." (McIntyre v. McIntyre, Fla., 53 So. 2d 824). To effect a change of domicile there must be a removal and an intent to make a change of domicile. (McIntyre v. McIntyre, *supra*; Gipson v. Gipson, 151 Fla. 587, 10 So. 2d 82, text same).

It appears from the request for opinion and the file handed us therewith that in the instant case the wife owns a dwelling in Collier county, in which she resides during the time the public schools in said county are in session, at least during the days school is in session; she being a teacher in the Collier county public schools; that the husband owns a dwelling in Hardee county, Florida, in which county he is employed or is in business, evidently the year round, being employed therein during business hours of each business day of the year. It appears from the file that "this couple is not divorced or legally separated, except that their occupations require them to live in these two counties. They are together only on week-ends." No evidence appears in the file before us showing at which dwelling they spend their week-ends.

Because of the above cited authorities, holding that the wife's domicile or residence follows that of her husband, in the absence of evidence showing grounds sufficient to permit divorce or legal separation, we must presume that the wife's domicile follows that of her husband, so that her permanent domicile or home is the same as that of her husband. The wife's permanent home, within the purview of §7, Art. X, of the State Const., the homestead tax exemption amendment, follows that of her husband; unless and until there is a showing of grounds for divorce or legal separation. The fact that they are together on week-ends tends to refute grounds for divorce or legal separation. Under the facts and evidence before us at this time separate homestead tax exemptions to both husband and wife, in the same or separate counties, would not be justified.

As both the husband and the wife have filed claims for homestead tax exemption for the same year it would seem advisable that the location of the permanent home of the couple, which lies within either Collier or Hardee counties, be determined jointly by the assessors of taxes for said counties, unless one of the applications be withdrawn.

063-10—February 6, 1963

TAXATION

CLAIM OF MINORS RESIDING IN THIS STATE WITH THEIR PARENTS FOR HOMESTEAD TAX EXEMPTION— §7, ART. X, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are minors owning real property in this state and residing thereon permanently with their parents, who are aliens temporarily in this state, entitled to homestead tax exemption on such real property?

We gather from your request for opinion, and your file handed us therewith, that "A" who is in this country is an alien of the United States in this country on a temporary visa but living in Florida with his wife and some three or more children, two of which children were

born in the United States. He at the present has the status of a Cuban refugee.

In his letter to this office, under date of April 9, 1962, the attorney general of the U. S. advised this office that Cuban refugees "are not considered as permanent residents of the United States within the immigration law." By the very nature of things, a foreigner in this country under a temporary visa, or other than a permanent visa, may not be considered a permanent resident of this state necessary for obtaining homestead tax exemption. Mr. "A," above mentioned, being an alien in this country under other than a permanent visa, cannot be classified as a permanent resident of Florida necessary for him to qualify for homestead tax exemption under and pursuant to §7, Art. X, State Const. We are advised that Mr. "A" has purchased a dwelling house in Florida and is now residing therein with his wife and children, including the two of his children born in Florida. The question has been posed as to the homestead status of the dwelling owned by Mr. "A" *should it be conveyed* to the two of his children born in Florida, or to one of them. We now reach the question of the said two children with their relation to the U. S. and Florida because of having been born in Florida and the U. S., and whether or not they may be deemed Florida citizens.

Under §1, 14th Am. to the U. S. constitution, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. . . ." In *Perkins v. Elg*, 307 U. S. 325, 59 S. Ct. 884, 83 L. Ed. 1320, the plaintiff, Marie Elizabeth Elg, was born in New York Oct. 2, 1907, of Swedish parents who subsequently returned to Sweden, she having returned to Sweden with her mother in 1911. In 1929, she returned to the U. S. without either of her parents. In April of 1935 she was officially notified that she was illegally in the U. S.; whereupon she brought legal proceedings to determine her status as a citizen of the U. S. In this case the U. S. supreme court held Miss Elg to be a citizen of the U. S., remarking that "on her birth in New York, the plaintiff became a citizen of the United States." Under the above constitutional provision an opinion and decision of the U. S., the two children of Mr. "A" who were born in the U. S. as aforesaid, are citizens of the U. S., and now residing in the U. S., they are "subject to the jurisdiction thereof," and citizens of Florida and of the U. S.

Section 7, Art. X, State Const., provides in part that "every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home . . . shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of five thousand dollars on said home and contiguous real property. . . ." Should the title to the above mentioned real property pass to the said children born in Florida, or one of them, and their parents continue to reside in such property, then the owners of such property would be residing thereon, although under parental control. The above quoted language was taken from §7, Art. X, State Const., as amended at the general election in 1938. The original §7, Art. X, State Const., provided a like homestead exemption from taxation "to every head of a family who is a citizen of and resides in the State. . . ." By the 1938 amendment, the requirement that the person claiming homestead tax exemption be the head of a family was deleted and is no longer required. If the two children, above-mentioned, were of age or otherwise sui juris and were vested with the title to the property in question, making the same their permanent

home, they would be entitled to tax exemption under §7, Art. X, State Const. Under such circumstances, such children would be entitled to the said exemption even though their parents, or other kin, resided with them on the said property, so long as they themselves made their permanent home thereon. Were a home for minor children, citizens and residents of the state and of the U. S., maintained in this state for such minor children from their own estate, such would seem to constitute their home in this state.

Section 7, Art. X, State Const., provides in part that "every person who has the legal title or beneficial title in equity to real property in this state" and who maintains his permanent home thereon is entitled to homestead tax exemption. (Emphasis supplied.) There is nothing in said §7, Art. X, limiting the use of the term "person" to adults only. Our examination of legal authorities defining the term "person" leads to the conclusion that the term may be used to refer to minors and infants as well as to adults (70 C. J. S. 686-689; 32 Words and Phrases, Perm. Ed., 302-303 and 315-316; Black's Law Dict., 4th Ed. 1299-1300). Under proper facts and circumstances, it seems that a minor or child under age is a "person" within the purview of §7, Art. X, State Const., insofar as it provides that "every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home, . . ." Two requirements under the constitution are legal or equitable ownership of the property and the making of the owner's permanent home thereon. Prior requirements that the owner be the "head of a family who is a citizen of and resides in the State" was largely eliminated by the 1938 amendment; ownership and permanent residence on the property are the present requirements.

The child or children in question, should the property in question be conveyed to them, would have the ownership; but do they have the permanent residence required? The general rule in this state is that the domicile of a minor child, during minority, follows that of its parents (*Chisholm v. Chisholm*, 98 Fla. 1196, 125 So. 694, text 702; 28 C. J. S. 21, §12). Cuban nationals in this country as refugees actually have no valid fixed place of domicile; although the father and mother of the two children above mentioned appear to be Cuban nationals, two of the children in question are citizens of the U. S. and of Florida as above demonstrated. Although the alien parents of the minor citizens might be subject to extradition under the immigration laws, the minor citizens would not seem to be subject to extradition under such laws. The children mentioned are not disqualified to claim homestead tax exemption because of the fact their parents are aliens should it be demonstrated to the satisfaction of the tax assessor that they have from all available evidence established a permanent home on the property claimed to be tax exempt under §7, Art. X, State Const. The fact that their parents are Cuban refugees in this state under a temporary visa, or no visa at all, will not of itself be sufficient for denying a homestead tax exemption claim if the evidence shows to the satisfaction of the tax assessor that the children are permanently domiciled on the property claimed to be tax exempt. In these cases application for the exemption may be filed for and in behalf of the minor by the person having custody of such minor, or the guardian if any.

063-11—February 8, 1963

TAXATION

TAX SITUS OF INTANGIBLES WHEN TRUSTEE MOVES
DOMICILE TO ANOTHER STATE*To: Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where is the tax situs of intangible personal property vested in and held by a testamentary trustee, when such trustee moves his domicile from his home state to another state?

A citizen and resident of Massachusetts, domiciled in Westfield, Hampden county, Mass., died testate in said state sometime after Nov. 27, 1950, the date of his last will and testament hereinafter mentioned, which last will and testament was duly filed in and probated by the probate court of said Hampden county, Mass., and the estate of the decedent administered by the executor therein named. The decedent, by his said last will and testament, after making provision for the payment of his just debts and obligations as well as other estate obligations and expenses, devised an amount equal to one-fourth of the net assets of his estate to one of his two children, and the same amount to the other of his said two children, which sums appear to have been paid over by the personal representative.

The undisposed one-half of the net assets of the testator's estate passed under the said last will and testament to DCL, one of the testator's sons, "in trust, however, for the use and benefit" of the testator's widow "for and during the term of her natural life." Under this trust, set up by the decedent, his widow receives the net income from the said trust; and also, under circumstances set out in the last will and testament, may receive a part of the corpus of the said estate. This trust will terminate upon the death of the said widow, who, so far as we are advised, is still in life. On or about Nov. 1, 1960, the said trustee moved his residence and domicile in Massachusetts to Broward county, Florida, where he and his family now reside and are domiciled. This trust consists largely of intangible personal property, title and control of and over which passed to the said trustee prior to his having moved to Broward county on or about Nov. 1, 1960. So far as we are advised from the file before us this trust is being administered by the trustee from his location in Broward county.

"Ordinarily, since the trustee holds the legal title, the situs of intangible personal property held by a trustee, for the purpose of taxation, is at the domicile of the trustee, even though the cestui que trust is not a resident of the state in which the trustee is domiciled, especially where the trustee also holds the property involved at his domicile." (84 C. J. S. 238 and 239, §117). The U. S. supreme court in *Safe Deposit and Trust Co. v. Virginia*, 280 U. S. 83, 50 S. Ct. 59, 74 L. Ed. 180, text 184, recognized that "the fiction of mobilia sequuntur personam may be applied in order to determine the situs of intangible personal property for taxation." "Intangible movables, such as debts and other choses in action ordinarily follow the person . . . and have their situs at the domicile of the owner." (15 C. J. S. 928, §18). "Although the state of the domicile of the beneficiary cannot tax the corpus of a trust in intangible property in the hands of a non-resident trustee . . . the equitable interest or intangible personal property right and interest of a beneficiary in a trust consisting of

personal property may be of such a nature that it has a taxable situs in the state of domicile or residence of the beneficiary," under appropriate statutory provisions (84 C. J. S. 240, §117). The courts under some circumstances have recognized that intangible personal property may have more than one situs for tax purposes (84 C. J. S. 241, §118). In 2 Cooley on Taxation, 4th Ed., 1048 and 1049, §469, it is stated that "except where otherwise provided by statute, regardless of the residence of the beneficiaries of the trust, the situs of personal property held by a trustee, for purposes of taxation, is in the state where the trustee is domiciled."

Massachusetts has in many cases held that the situs of intangible personal property held in trust follows the person of the trustee and is taxable at his domicile or place of residence (Harvard Trust Co. v. Commissioner, 284 Mass., 225, 187 N. E. 596; Harrison v. Commissioner, 272 Mass., 422, 172 N. E. 605; First Nat'l Bank v. Commissioner, 279 Mass., 168, 181 N. E. 205, text 207; Welch v. City of Boston, 221 Mass., 155, 109 N. E. 174, text 175). As to trustees such properties are taxable at the domicile or residence of the trustee (Ann. in 67 A. L. R. 394; 127 A. L. R. 379; and 172 A. L. R. 341). This appears to also be the law in Florida (State v. Beardsley, 77 Fla. 803, 82 So. 794, text 799; Wood v. Ford, 148 Fla. 66, 3 So. 2d 490, text 495; Hunt v. Turner, 54 Fla. 654, 45 So. 509, text 513 and 514).

The above-mentioned rule that the situs of intangible personal property, for the purpose of ad valorem taxation, is in the state where the trustee is domiciled, appears to be subject to a few exceptions; for example, judicial trustees who under the decree setting up the trust are mere agents of the court establishing them (Kramme v. Mewshaw, 147 Md. 235, 128 A. 468). The fact that a will setting up a trust may have been probated in a state other than the one wherein the trustee resides will not of that fact alone establish a judicial trustee or fix the situs of the trust properties for taxation purposes.

On the record before us, the intangible personal property of the trust mentioned in the above stated question, and described in the first and second paragraphs hereof, would be taxable in Florida at the place of domicile of the trustee, where such nonresident moves to this state after the beginning of a tax year (Jan. 1) his said property will not be taxable in this state until the following tax year.

063-12—February 8, 1963

LEGISLATORS

INELIGIBILITY FOR APPOINTMENT OR ELECTION TO OFFICES CREATED DURING SESSION IN WHICH THEY SERVE—§5, ART. III, STATE CONST.

To: Tom Adams, Secretary of State, Tallahassee

QUESTION:

May a duly elected member of the house of representatives be elected to one of the newly created senate seats at the forthcoming special election?

You correctly observed that §5, Art. III, State Const., must be construed in determining the answer to this question which provides as follows:

No senator or member of the house of representatives shall, during the time for which he was elected, be appointed or elected to any civil office under the constitution of this

state, that has been created or the emoluments thereof shall have been increased during such time.

At the outset, it appears evident that the purpose of the constitutional amendment was to prohibit the legislature from creating positions which were not needed and providing lucrative remuneration therefor and the members of the legislature ultimately occupying the positions so created. See *State ex rel Hawthorne v. Wiseheart*, 28 So. 2d 589. These facts are clearly not evident in the question presented. The positions were created under the mandate of the federal three-judge court decision in the reapportionment cases of *Sobel and Swann v. Adams* in which that court held that present provisions of the Florida constitution relating to apportionment of representation to the state legislature to be prospectively null, void and inoperative.

Thus, the positions created were in an effort to bring the Florida legislature in compliance with the provisions of the 14th amendment to the federal constitution. The federal three-judge court decision of yesterday has upheld the constitutionality of this plan, and that case has now been dismissed as moot.

It is a firmly-settled principle of law that in "construing and applying provisions of a Constitution, the leading purpose should be to ascertain and effectuate the intent and the object designed to be accomplished." *Mugge v. Warnell Lumber & Veneer Co.*, 58 Fla. 318, 50 So. 645, 646; *State ex rel Nuveen v. Greer*, 88 Fla. 249, 102 So. 739, 37 A.L.R. 1298. And the intention to be ascertained must be that of the framers and the people adopting it, for that intention is the "spirit" of the Constitution. *Amos v. Mathews*, 99 Fla. 1, 126 So. 308; *Sullivan v. City of Tampa*, 101 Fla. 298, 134 So. 211; *City of Jacksonville v. Continental Can Co.*, 113 Fla. 168, 151 So. 488; *State v. City of Miami*, 113 Fla. 280, 152 So. 6; *City of Tampa v. Tampa Shipbuilding and Eng. Co.*, 136 Fla. 216, 186 So. 411; *State ex rel McKay v. Keller*, 140 Fla. 346; 191 So. 542; *Sylvester v. Tindall*, 154 Fla. 663, 18 So. 2d 892; *Story on Constitution*, 5th Ed., §400. (*State v. Gray*, 74 So. 2d 114.)

The situation is not unlike that presented to the Florida supreme court in the case of *State v. Gray*, above referred to, where former Senator Charley E. Johns had been a member of the legislature which had increased the salary of the governor and, due to the untimely death of Governor McCarty, assumed that position by reason of his being president of the senate. The question then arose as to whether or not he was eligible under §5, Art. III, State Const., to be a candidate and, if elected, serve for the balance of the term. The court concluded that a "reasonable and common sense legal approach to the question" therein involved would sustain a conclusion that Governor Johns was not disqualified to serve, the rationale being that it was clear that there could have been no temptation on the part of the legislature or any member thereof "of prostituting their position for private gain or preference" in taking the action that they did as legislators. This reasoning when applied to the facts before us clearly makes mandatory the conclusion that the members of the legislature could have had no motive other than complying with the requirements of the 14th amendment to the federal constitution in taking the action that they did in increasing the size of the senate and house of representatives. It should be noted that this was a decision of the court and not an advisory opinion and, therefore, can be cited as binding authority for the questions raised therein.

The conclusion reached is in keeping with the long line of authority to the effect that this section of the constitution should be construed to uphold the officers' eligibility if reasonably possible. (State ex rel Fraser v. Gay, 28 So. 2d 901.)

It would be illogical and unreasonable to conclude that the members of the legislature, by reapportioning their membership, in compliance with the Florida constitution and federal court decree, would be precluded from being candidates for and serving in the offices created by their act of compliance. Section 3, Art. VII, State Const., required decennial reapportionment until the recent federal three-judge court decision had the effect of invalidating its provisions. See Sobel v. Adams, 208 F. Supp. 316, 324, and Advisory Opinion of the Justices of the Supreme Court of Florida to the Governor dated Jan. 30, 1963. The mandate of the federal court in the Sobel case is now substituted for the mandate in former §3, Art. VII, State Const., and by its act of reapportionment the legislature merely followed that mandate.

In light of the above statutes and authorities, your question is answered in the affirmative.

063-13—February 13, 1963

LEGISLATURE

PAYMENT OF ADDITIONAL LEGISLATIVE EXPENSES OCCASIONED BY REAPPORTIONMENT—§11.12(2), 11.15(3), F. S.; CH. 61-400, LAWS OF FLORIDA

To: Mallory E. Horne, Speaker, House of Representatives, Tallahassee

QUESTION:

May the expenses, incident to the increase of the membership of the house of representatives created by the recent reapportionment, be paid out of the general house expense fund by the speaker of the house of representatives?

Under the provisions of the general appropriations act, the legislature provided lump sum appropriations for the payment of legislative expenses during the 1961-1963 biennium (Item 249, §2, Ch. 61-400, Laws of Florida). The legislature had also previously enacted the following provision relating to the payment of legislative expenses as follows:

(2) There is hereby appropriated biennially out of the general revenue fund *a sufficient sum to cover legislative expenditures between and during any regular, special or extraordinary sessions to be released by the budget commission as needed.* (Emphasis supplied.) §11.12(2), F. S.

It is apparent from the foregoing-quoted provision that the legislature intended that there be available "between and during any regular, special, or extraordinary session" sufficient funds to cover legislative expenses incurred during that period.

As a result of the recent federal court decision in Sobel and Swann v. Adams approving the legislature's reapportionment plan, there has been an increase in the membership of the house of representatives. While the exact date of the enactment and approval of a reapportionment plan was not known by the legislature, this matter has been one of which the legislature has long been cognizant. The legislature, in providing for legislative expenditures, must be regarded as having had in mind the actual conditions to which such legislation

would apply as well as those reasonably expected to follow. (See *Florida Industrial Com. v. Growers Equip. Co.*, 12 So. 2d 889.)

The fundamental rule of construction is to ascertain and give effect to the intention of the legislature as expressed in the statute (10A Florida Digest, Statutes, §181). The legislature, in providing for a general expense fund, intended that such fund would encompass those *legislative expenses* "necessary to enable the legislature to properly perform its functions." (See 24 Words and Phrases, Ch. 660.)

It would reasonably follow, in furtherance of the proper performance of legislative business, that expenses would be incurred incident to the increase in the membership of the house such as the acquisition of additional desks and office space for the new legislators and the expansion of other facilities. Any other conclusion might render the provision relating to legislative expense useless or meaningless (*Webb v. Hill*, 75 So. 596).

Therefore, it is my opinion that the speaker of the house of representatives under the statutory authority given him pursuant to §11.15 (3), F. S., would be authorized to pay out of the general house expense fund those legislative expenses occasioned by the recent reapportionment litigation as are necessary to enable the house of representatives to properly perform its function.

063-14—February 14, 1963

FLORIDA INDUSTRIAL COMMISSION

DEPARTMENT OF APPRENTICESHIP—EXPENDITURE OF FUNDS FOR TRAINING OTHER THAN APPRENTICESHIP TRAINING—CH. 446, §§443.12(6), (11) AND 282.071, F. S.

To: *Burnis T. Coleman, General Counsel, Florida Industrial Commission, Tallahassee*

QUESTIONS:

1. May the department of apprenticeship spend any of the funds available to it in connection with on-the-job training in Florida other than apprenticeship training as defined in Ch. 446, F. S.?

2. May the department of apprenticeship of the Florida industrial commission enter into contracts with the secretary of labor of the U. S., as contemplated by the manpower development and training act, for the purpose of assisting in the on-the-job training of individuals in training other than apprenticeship training but with respect to which any expenses incurred by the department of apprenticeship will be reimbursed to the state by the secretary of labor?

The legislature has created a state apprenticeship council and a department of apprenticeship within the Florida industrial commission for the purpose of making "available to the young people of Florida an opportunity to obtain training that will equip them for profitable employment and citizenship" and "setting up as a means to this end, a program of voluntary apprenticeship under approved apprenticeship agreements."

The legislature has heretofore appropriated funds for the purpose of administering the apprenticeship program in accordance with Ch. 446, F. S. Since the legislature contemplated that such funds be used in connection with the apprenticeship program and since it appears that Ch. 446 contains no language authorizing expenditures for any

purpose other than in connection with such program, it is my opinion that the department of apprenticeship would not be authorized to spend any of the available funds in connection with "on-the-job training of individuals" as distinguished from "on-the-job training of apprentices."

You advise our office that according to the provisions of the federal manpower development and training act of 1962 (PL 87-415), the secretary of labor is authorized to enter into contracts with state agencies having the requisite authority in order that such agencies may assist the secretary of labor in making on-the-job training available to persons other than apprentices. You further advise that in accordance with the provisions of the federal act, any expenses incurred by the department of apprenticeship in connection with the on-the-job training of individuals other than apprenticeship training will be reimbursed to the state by the secretary of labor. Stated differently, the state will incur no expenses in connection with assisting in on-the-job training of individuals.

While I have indicated above that the department of apprenticeship would not be authorized to expend its own funds in connection with on-the-job training of individuals, it would seem that the Florida industrial commission would not be precluded from providing assistance to the federal government in connection with such program where no expenditure of state funds is contemplated. Agreements of this type would appear to be in keeping with the general powers and duties of the Florida industrial commission relating to employment set forth in part as follows:

The commission with the advice and aid of advisory councils, and through the appropriate divisions, *shall take all appropriate steps to reduce and prevent unemployment; to encourage and assist in the adoption of practical methods of vocational training, retraining and vocational guidance; . . .* (Emphasis supplied.) Section 443.12(6), F. S. (See also §443.12(11), F. S.)

Accordingly, it is my opinion that the Florida industrial commission (rather than the department of apprenticeship) would be authorized to enter into contracts with the secretary of labor of the U. S. as contemplated by the manpower development and training act for the purpose of assisting in on-the-job training of apprentices where any expense incurred by the commission will be reimbursed to the state by the secretary of labor. The commission may delegate the responsibility of administering this particular program to the department of apprenticeship subject to the limitations of expenditures as heretofore mentioned and those contained in §282.071, F. S.

063-15—February 15, 1963

TAXATION

SEPARATELY-OWNED DWELLING UNITS WHICH OVERLAP OR ENCROACH UPON EACH OTHER—§192.02, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May dwelling units in multiple unit buildings so constructed that parts of separate units overlap or encroach upon each other so that parts of upper dwelling units overlap or encroach upon lower dwelling units, be separately assessed for ad valorem taxes?

This question concerns multiple dwelling units, similar in nature to those considered by the courts in *Overstreet v. Tubin*, Fla., 53 So. 2d 913, and *Gautier v. State*, Fla. App., 127 So. 2d 683, in connection with claims for homestead tax exemption. In these cases the dwelling units, although separated by party walls and individually owned, including the land upon which located, were parts of buildings housing two or more dwelling units. In each of these cases, although the property was claimed to be homestead tax exempt by each owner, each dwelling unit was part of a multiple unit dwelling or building. In *Overstreet v. Tubin*, supra, a duplex dwelling unit, although the apartments were separately owned, was deemed but a single "dwelling house," and in *Gautier v. State*, supra, a four-unit apartment house, although each unit was separately owned, was deemed but a single "dwelling house." In the first case exemptions of \$2,500 were allowed, and in the second case exemptions of \$1,250 were allowed. These two cases involved one-story buildings.

Where separate apartments or dwelling units in a multiple unit building are so constructed that no apartment or dwelling unit encroaches upon or overlaps another apartment or dwelling unit we encounter little difficulty when making tax assessments against the properties. However, we encounter difficulties when we encounter apartments or dwellings in a multiple unit building which are superimposed on other apartments or dwelling units so that the upper one rests upon the lower one, and *though* the lower one occupies the same ground area. In such a case the two apartments and the land upon which they rest comprise but a single parcel of real property. We encounter similar difficulties when portions of one apartment or dwelling unit overlap or encroach upon another; for example, a room of one apartment or dwelling unit is superimposed or rests upon a room of another apartment or dwelling unit. That is, where two apartments or dwelling units are so constructed that a room or rooms of an upper story of one apartment or dwelling unit is or are superimposed or rest on corresponding rooms of another apartment or dwelling unit. In such cases corresponding lower story rooms in one apartment or dwelling unit support corresponding upper story rooms in another apartment or dwelling unit. These lower story rooms of one apartment and upper story rooms of another apartment rest upon the same parcel or piece of real property or ground area. In law they are part and parcel of the same parcel of real property.

Under the constitution, laws and statutes of Florida, the levy and assessment of ad valorem taxes is on the realty itself, at its full cash value, regardless of the existence of the estates in it. (*Bancroft Inv. Corp. v. Jacksonville*, 157 Fla. 546, 27 So. 2d 162, text 167.) Under §192.02, F. S., the term "real property" is construed "to include lands and all buildings, fixtures and other improvements thereon." The statement is made in 31 Fla. Jur. 140, §252, that "in the case of taxation of land, the levy and assessment is on the realty itself, not on the owner of the land." No provision is to be found in the current general statutes and laws of Florida imposing any personal liability upon the owner of real property for the payment of ad valorem taxes encumbering such real property; enforcement being against the real estate assessed. At the present time no provision is made in the taxing statutes for the enforcement of real estate taxes against the owner thereof personally. This being true real estate ad valorem taxes must be imposed against the real property itself and not against the owner personally. In the matter before us the tax imposition is against the real

property and the buildings, fixtures, and improvements thereon (§192.02, F. S.), not against the owners thereof.

There is no legal obligation on the part of assessors of taxes in this state to assess other than the real property itself under its legal description as appears from the public records or such other description as will clearly identify the property assessed. Where owners of adjoining properties, through agreement between themselves, have so constructed their buildings, or their predecessors in title have so constructed such buildings, that parts of the building or living unit of one owner overlap or encroach on the building or living unit of the other owner, such ownerships, overlaps or encroachments will not authorize assessments under other than legal descriptions of the lands upon which such buildings are located; with the exception of condominiums and other legally-recognized titles. The persons owning the properties in which the overlaps and encroachments occur must arrange between themselves for apportionment of the taxes assessed against the properties.

The above stated question is generally answered in the negative; a positive negative answer should not be given applicable in all cases, but each case must be determined from the facts and circumstances applicable thereto, remembering that the assessment is against the property and not the separate interest in the real property to be assessed. We do not intend to say that undivided interests in an entire parcel of real estate may not be separately assessed.

063-16—February 18, 1963

INCORPORATED SOCIAL CLUBS

SALE OF ALCOHOLIC BEVERAGES TO MINOR MEMBERS,
BILLIARDS AND POOL PLAYING—CHS. 617, 561;
§§561.34(11), 562.11, 562.111, 562.13, 562.48, 450.071,
849.06, F. S.

To: *Carl D. Buchanan, Chief of Police, Winter Park*

QUESTION:

May a social club, incorporated as a nonprofit association or corporation under Ch. 617, F. S., and licensed to sell intoxicating beverages to members and their guests, under §561.34(11), F. S., admit to membership and permit minors to play pool and billiards, and serve alcoholic beverages to minors?

The pool and billiard association in question was incorporated under Ch. 617, F. S., expressly to "create, develop and maintain the sport of pool and billiards in the area of . . . and to establish and maintain standards of ethics, conduct and deportment and the character of the membership of this association commensurate with sobriety, good behavior and the standards of this community. . . . Any person over the age of 18 years of good character and who subscribes to these articles of association and who complies with these articles and bylaws of the association and who is accepted by the membership committee, shall be entitled to membership herein so long as such membership is approved by the membership committee according to the bylaws of this association."

Section 561.34(11), F. S., provides that "persons associated together as a chartered or incorporated club, including social clubs incorporated" under Ch. 617, F. S., "after their charters have been found

to be for objects authorized by law and approved . . . as organized for lawful purposes and not for the purpose of evading license taxes on dealers in beverages defined herein," in Ch. 561, F. S., "which such organizations are bona fide clubs, and at the time of application for license hereunder shall have been in continuous active existence and operation for a period of not less than two years in the county where they exist, shall before serving or distributing to their members or nonresident guests the beverages defined herein, . . . pay annual license taxes" as provided in said §561.34(11), F. S., to qualify to sell intoxicating beverages.

Section 562.11, F. S., makes it unlawful for any person, by himself or through employees, "to sell, give, serve or permit to be served alcoholic beverages, including wines and beer, to persons under twenty-one years of age or to permit a person under twenty-one years of age to consume said beverages on the licensed premises." Section 562.111, F. S., makes it "unlawful for any person under the age of twenty-one years to have in his or her possession alcoholic beverages," with certain exceptions not here material. This section is not limited in its operation to licensed alcoholic beverage dealers. Section 562.13, F. S., makes it "unlawful for any vendor licensed under the beverage law to employ any person under twenty-one years," with certain exceptions not here material. Under §450.071, F. S., "no person under twenty-one years of age, whether such person's disabilities of non-age have been removed by marriage or otherwise, shall be employed, permitted or suffered to work in, about, or in connection with, any poolroom, billiard room, brewery, saloon, barroom, or any place where alcoholic beverages are manufactured or sold," with certain exceptions not here material. See also §562.48, F. S., applying to dance halls where malt, spirituous or vinous beverages are sold.

Section 849.06, F. S., provides that "any person, or any employee of such person, operating any pool or billiard saloon in this state, or operating any place where pool or billiards are publicly played, who shall permit or allow any person under the age of twenty-one years to play pool or billiards or to visit or loiter in any pool or billiard saloon . . . shall be guilty of a misdemeanor, . . ." (Emphasis supplied.) The controlling phrase in the above quoted portion of said §849.06 is "are publicly played." Publicly is a term derived from the word public; it signifies something which is open to the knowledge or view of the public; something generally seen, known or heard; something done in an open and public manner; without concealment. It is the antonym of private, secret, secluded or concealed. (People v. Carman, 385 Ill. 23, 52 N. E. 2d 197, text 199; Wolf v. U. S., CCA 8th, 259 Fed. 388, text 391). It means public, well-known, open, notorious, common or general; as opposed to private, secluded or secret. (Fairchild v. U. S., CCA 8th, 265 Fed. 584, text 586). In Lockhart v. Stone, 10 Tex. 275, text 276, it was held that a room kept as a common resort for persons desiring to play cards for money was a "public gambling house." Miniature golf courses and dance halls, to which the public is admitted, have been held to be public places. (Jaffarian v. Somerville, 275 Mass. 267, 175 N. E. 641, text 642; Commonwealth v. Quinn, 164 Mass. 11, 40 N. E. 1043.) Whether or not an establishment is a place where pool or billiards is publicly played is largely a question of fact to be determined from the attending circumstances and transactions.

The fact that the nonprofit corporation in question was organized and incorporated for the purpose of creating, developing and maintaining the sport of pool and billiards strongly indicates that corpor-

ate members will be permitted to play pool with corporate facilities, as well as to visit or loiter in the pool or billiards saloon; further, the fact that it has been licensed to sell alcoholic beverages, under §561.34 (11), F. S., indicates that such beverages will be sold and consumed on its premises, including in its pool and billiard room or facilities. When this is considered, in the light of the provision in the corporate charter that persons over the age of 18 years may become members of the association, there appears reasonable possibilities that §849.06, F. S., will be violated should a person under the age of 21 years, whether a member of the social club or not, be permitted to publicly play pool or to visit or loiter in the saloon, room or place where pool or billiards are being publicly played; and should alcoholic beverages be sold or furnished him in such saloon, room or place a violation of §§450.071 and 562.13, F. S., will occur. We know of no prohibition against a minor becoming a member of an incorporated social club or association, so long as said §§450.071, 562.13 or 849.06, F. S., are not violated in connection therewith.

063-17—February 19, 1963

TAXATION

TAX EXEMPT STATUS OF BLOOD BANKS—LEON COUNTY BLOOD BANK TRUST—§192.06, F. S.; §1, ART. IX, §16, ART. XVI, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is the property, both real and personal, of blood banks, including corporations, which receive, store and supply human blood when needed as a public service, entitled to tax exemption?

Blood banks appear to be of recent origin and are described as a place for the storage of blood and blood plasma. The word "bank" is defined in Dorland's Ill. Med. Dict., 23rd Ed., as "a stored supply of human material or tissues for future use by other individuals." Examples given are blood bank, bone bank, eye bank, etc. Plasma is the fluid portion of the blood in which the corpuscles are suspended. Both blood and blood plasma may be introduced into the human blood stream by the process of transfusion, which is defined in the dictionaries as the introduction of whole blood, plasma substitutes, or other injectable solution into the blood stream. (Dorland's Med. Dict., *supra*).

We have before us, as an example of a blood bank as an institution, a certified copy of the charter of the Leon county blood bank, a nonprofit corporation, organized, incorporated and existing under and pursuant to Ch. 617, F. S. It appears from said charter that the "general nature and object of this corporation shall be to acquire, extract, collect, type, treat, store and distribute blood and plasma of all kinds; to stand ready to meet emergencies requiring blood and blood plasma of all kinds; to supply without charge blood and plasma to indigents or those unable to pay for same; to erect suitable structures and to own real estate and to have all powers which may be necessary or proper for carrying out the general purposes of the corporation."

In *Orange County v. Orlando Osteopathic Hosp.*, Fla., 66 So. 2d 285, it was demonstrated that the said hospital required that its pa-

tients able to pay, pay in full for their care in the hospital, but "if he is able to pay only a part nevertheless he is received and treated and the hospital accepts the amount he is able to pay. If a patient applies who is unable to pay nevertheless he is accepted and accorded the same treatment and attention as those who pay." Under these circumstances the hospital was held to be a charitable institution entitled to tax exemption under §192.06 F. S., and §1, Art. IX, and §16, Art. XVI, State Const. If the blood bank stands ready to meet emergencies requiring blood and plasma of all kinds, within its supply and ability, and without charge to indigents and those unable to pay for same, within its supply and ability, it would be a charitable institution within the meaning and purview of said §192.06, F. S., and constitutional provisions above mentioned, and will continue to be such so long as it so operates.

Whether or not a blood bank is entitled to tax exemption depends upon its holding its property exclusively for one or more of the purposes mentioned in said constitutional provisions and using the same therefor. If so, it is entitled to tax exemption, but if not, it is subject to taxation. Taxes heretofore paid by a corporation so operating at the time the taxes were assessed, upon compliance of the refund statutes, would be entitled to a refund of such taxes.

063-18—February 20, 1963

TAXATION

DOCUMENTARY STAMP TAXES—INTERLOCKING CORPORATE INTERESTS AND SUBSIDIARIES—§201.02, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Are deeds conveying real property from parent corporations to their wholly owned subsidiaries subject to documentary stamp taxes?
2. Are deeds conveying real property from individuals, to corporations, whose stock is wholly owned by such individuals, subject to documentary stamp taxes?
3. Are deeds conveying real property from parent corporations to their subsidiaries, as contributions to the capital of such subsidiaries, subject to documentary stamp taxes?
4. Are deeds conveying real property from individuals to their wholly owned corporations, as contributions to capital, subject to documentary stamp taxes?

Section 201.02, F. S., relating to documentary stamp taxes, provides, in so far as here material, that "on deeds, instruments or writings, whereby any lands, tenements or other realty, or interest therein, shall be granted, assigned, transferred, or otherwise conveyed to or vested in the purchaser, or other person by his direction, on each \$100 of the consideration, therefor the tax shall be 20¢. . . ." The first requirement for the taxation of an instrument, in the nature of a deed under said §201.02, F. S., is that such instrument convey or transfer the title to lands or an interest therein to a purchaser, or other person by the purchaser's direction; and the second is that a consideration measured in U. S. money be given therefor. If the instrument affecting a parcel of real property has the effect of transferring such property from one person to another such an instrument would appear to be within the purview of said §201.02, F. S., and subject to taxation under

said section *if there be a taxable consideration* passing from the grantee to the grantor. Said §201.02, F. S., "applies only to a monetary consideration" (*Culbreath v. Reid*, Fla., 65 So. 2d 556, text 557). (Emphasis supplied.)

In *DeVore v. Gay*, Fla., 39, So. 2d 796, text 797, the court said that "when taxes are to be levied according to a monetary consideration, the law contemplates that such tax should be confined to the actual monetary consideration or to considerations which have a reasonable pecuniary value." Section 201.02, Florida Statutes, is substantially the same as §4361, title 26, U. S. code, and may have been derived from prior federal statutes on the same question. Federal tax regulations 43.4361-1 and 43.4361-2 made applicable under §4361, title 26, of the federal statute, set out examples of conveyances subject to the federal tax and others not subject to the said tax. Included in this list of taxable instruments are conveyances of realty in exchange for other property; in consideration of life maintenance; to a corporation in exchange for shares of its stock; and by a partner to the partnership as a contribution of partnership assets. Included in these rules and regulations as not being subject to the tax are "conveyances of realty without consideration and otherwise than in connection with a sale, including a deed conveying realty as a bona fide gift" including conveyances based on love and affection, to promote the public welfare, to a straw man under some conditions.

In *Marks v. Green*, Fla. App., 122 So. 2d 491, the district court of appeal, 1st Dist., held that "the fact that taxpayer owned all of the stock of a domestic corporation, the assets of which were principally intangible, and corporation paid tax on intangible property, did not constitute payment of such tax by taxpayer, and did not relieve taxpayer from liability for intangible tax levied on value of (his) stock." Under general law a "corporation is regarded as a legal entity, separate, distinct and apart from the members (stockholders) who compose it." (18 C. J. S. 368, §4; 13 Am. Jur. 157, §6).

Deeds of conveyance from a parent corporation to its subsidiary corporation, or from an individual to a corporation, even where such individual owns all the stock of such corporation, and otherwise to a corporation, are of property "granted, assigned, transferred or otherwise conveyed to or vested" in such corporation, within the purview of §201.02, F. S., and are subject to the tax imposed by said section, if such conveyances are made for a consideration, passing from the grantee to the grantor, which has some value measured in money of the U. S. The fact that the property conveyed from the grantor to the grantee has a monetary value is not controlling; the question being whether or not something passed from the grantee to the grantor, having a monetary value, and if so then there is a taxable transaction.

When a conveyance is made by a grantor to a corporation, as grantee, in consideration of corporate stock of the grantee issued or to be issued to the grantor, such transaction is a taxable one. Where a conveyance from a corporation to its subsidiary corporation is made resulting in an increase of the actual value of the stock of the subsidiary corporation, such transaction is a taxable one. Likewise, a conveyance from stockholders of a corporation to said corporation, as a contribution to capital, will result in an increase of the value of the outstanding corporate stock affected, and is a taxable transaction. In such cases the actual or book value of the corporate stock, not its par value, will be the measure of such consideration. Sometimes conveyances of real property are made subject to outstanding mortgages encumbering the lands conveyed; reference is made to our opinion 062-99,

of Aug. 1, 1962, raising a *rebuttable presumption* that such mortgage indebtedness was included in the consideration for the conveyance. In connection with the enforcement of §201.02, F. S., federal tax regulations numbers 43.4361-1, 43.4361-2 and 43.4361-3, doubtless would be of assistance.

Each of the above questions are answered in the affirmative; the tax imposed to be measured by the increase of the book value of the corporation or corporations to whom conveyances are made.

063-19—February 20, 1963

CRIMINAL PROCEDURE

FINE AND COSTS BOND—LIABILITY OF SURETY UNDER §921.15, F. S., WHEN DEFENDANT ARRESTED FOR PAROLE VIOLATION

To: M. H. Bowman, Sheriff, Sumter County, Bushnell

QUESTION:

Where a defendant who has made a fine and costs bond, payable within 90 days, under the authorization of §921.15, F. S., is arrested under a parole violation warrant prior to the expiration of such 90 days, and is subsequently returned to the state prison by reason of the parole violation charge, are the sureties on such bond responsible for the payment thereof at the expiration of such 90 days?

Section 921.15, F. S., provides for the making of a fine and costs bond. Such a bond is not given to secure the appearance of the defendant. The said statute makes no provision for the sureties to relieve themselves of obligation by surrendering the defendant. *Rather, the bond obligates the sureties to pay the amount of the bond.* Their liability to pay the bond on its due date is not affected by the fact that the defendant is arrested under a parole violation warrant which is unrelated to the fine and costs bond and is later returned to the state prison by reason of the parole violation charge. Therefore, it is my opinion that the sureties on the bond were not relieved of any part of their obligation thereon and they are responsible for the total amount of such bond.

063-20—February 21, 1963

TAXATION

CHAPTER 274, F. S.—HOSPITAL TANGIBLE PERSONAL PROPERTY RECORDS—CHS. 155, 274; §§274.01, 274.09, 155.09-155.12, 155.15 AND 155.17, F. S.

To: Bryan Willis, State Auditor, Tallahassee

QUESTION:

Is a county hospital, organized and operating under Ch. 155, F. S., subject to the provisions of Ch. 274, F. S., the county tangible personal property control law?

Section 274.01(1) F. S., defines a "governmental unit" as "the governing board, commission or authority of the county or taxing district of the state . . ." Subsection (3) of said section defines "prop-

erty" as "all tangible personal property, owned by a governmental unit of a nonconsumable nature."

Section 274.09, F. S., provides that the provisions of Ch. 274, F. S., shall be liberally interpreted to be cumulative and supplementary to any general, special or local law, heretofore or hereafter enacted.

The broad powers of a board of hospital trustees authorized to deal with the management and control of a county hospital under the provisions of Ch. 155, F. S., indicates that such board should be considered as a commission or authority within the provisions of §274.01 (1), F. S.

Significantly, the board of hospital trustees is required to keep a separate, identified account of all expenditures and disbursements of the board. (§155.09, F. S.) The board of hospital trustees is authorized to disburse hospital funds for materials, supplies, equipment, wages, salaries or other items of expense and upon approval of such expenses by a majority of the members of the board of trustees, warrants may be drawn and are deemed authorized when countersigned by the chairman of said board. (§155.11, F. S.) The board of trustees annually reports its proceedings to the board of county commissioners and in connection therewith certify to that board the amount necessary for the improvement and maintenance of the hospital and the board of commissioners is required to provide such funds by levy of a sufficient tax upon all taxable property in the county. (§155.12, F. S.) The board of hospital trustees is authorized to negotiate and to purchase property desired by them for hospital purposes. (§155.15, F. S.)

It is also authorized to take title to property presented to the hospital by deed, gift, devise or bequest. In addition the hospital trustees are authorized to promulgate rules and regulations deemed expedient for the economic and equitable conduct of the affairs of the hospital and have exclusive control over expenditures of all moneys collected to the credit of the hospital fund. (§155.10, F. S.) All persons approaching or coming within the limits of the hospital and all furniture or other articles used or brought there are subject to the rules and regulations of the board of trustees pertaining thereto. (§155.17, F. S.)

In view of the above statutory provisions, I am of the opinion that a board of hospital trustees of a public hospital, being operated pursuant to the authority granted by Ch. 155, F. S., is to be considered a governmental unit; hence, primarily responsible for the proper safekeeping of tangible personal property of the hospital pursuant to the provisions of Ch. 274, F. S.

063-21—February 21, 1963

TAXATION

LICENSES AND LICENSE TAXES; TAKING ORDERS FOR INTERSTATE DELIVERY

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Where a resident of this state, by himself or his agents and employees, takes orders for the purchase of merchandise from an out-of-state dealer, who accepts or rejects such orders, and if accepted fills the same and delivers the merchandise purchased to the purchaser by

interstate carrier, is such person liable for an occupational license tax?

2. Would the answer to question 1 differ if the person taking said orders receives a percentage of the sales price as his compensation therefor?

"Under statutes and ordinances so providing, drummers, commercial travelers, and traveling salesmen, canvassers, or solicitors, including solicitors or canvassers for charitable or religious purposes, are subject to a license or license tax," (53 C. J. S. 595 and 596, §30) where no question of interstate commerce is involved. However, the general rule is "that a state statute or municipal ordinance imposing a tax or requiring a license for sale of, or solicitation of orders for, goods, constitutes an unlawful interference with interstate commerce as applied to solicitation of orders for goods not within the state at the time, but to be shipped, if and when the orders are accepted, from another state in fulfillment of the orders previously taken." (Ann. in 162 A. L. R. 859-867; *Cason v. Quinby*, 60 Fla. 35, 53 So. 741; *Wilks v. Bartow*, 86 Fla. 186, 97 So. 307.)

In *Olan Mills, Inc. v. Tallahassee, Fla.*, 100 So. 2d 165, the appellant sent solicitors into Florida taking orders for photographic work, later sending in a photographer into the state to take the photographs, which were sent to another state, where the appellant maintained a place of business, where the negatives were developed and the picture prints made, after which the photographs were delivered to the customer in Florida. The court held that each of these operations constituted an inseparable link in a chain of events making up interstate commerce. The attempt of the city of Tallahassee to impose a tax upon the transactions in Florida was held violative of the commerce clause of the federal constitution. From the above and foregoing we conclude that question 1 should be answered in the negative.

The court in *Olan Mills, Inc. v. Tallahassee*, supra, stated that since *Nippert v. Richmond*, 327 U. S. 416, 66 S. Ct. 586, 90 L. ed. 760, "The Supreme Court of the United States has squarely held that any direct tax upon the privilege of carrying on a business exclusively interstate in character is invalid as violating the commerce clause," and that "interstate commerce can be made subject to a license or privilege tax by the state only where there is a separable intrastate incident to which the tax can attach." Where orders for merchandise are taken in this state for the purchase thereof from particular merchants in another state the transaction is complete when the orders are accepted and filled by the merchant in his state and is a transaction of that state. Had the orders been taken by brokers, to be sent to such merchant as he might select, instead of being taken for sale by a particular merchant, then the broker would be subject to an occupational license tax for transacting a brokerage business in this state. (See *Dorsett v. Overstreet*, 154 Fla. 566, 18 So. 2d 759, 155 A. L. R. 228.)

Where the compensation of the person or persons taking orders in this state for sale and delivery, interstate, from another state is paid for the taking of said orders or making delivery in this state after the transportation of the particular goods so ordered from the business house of the seller in another state, the measure of payment for such services is of little concern, and may be based on a percentage of the sales price, so long as it is ultimately paid by the seller. This leads to a negative answer to question 2.

063-22—April 2, 1963

COUNTY FINANCIAL AFFAIRS

FUNDS OF COUNTY COMMISSIONERS—DEPOSIT, FEDERAL AND STATE SAVINGS AND LOAN ASSOCIATIONS— §665.44, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May funds of boards of county commissioners and county school boards be deposited in federal and state savings and loan associations?

Section 665.44, F. S. (a 1937 act of the legislature), provides that said funds could be "*invested in savings and loan associations.*" (Emphasis supplied.)

We find no statute authorizing the *deposit* of the funds of boards of county commissioners and county school boards in federal and state savings and loan associations.

Your question must therefore be answered in the negative.

063-23—February 22, 1963

BEVERAGE LAW, ADMINISTRATION

SALE OF BEER THROUGH COIN-OPERATED VENDING MACHINES—§§562.11, 859.06, F. S.

To: *Monroe W. Treiman, County Judge, Hernando County, Brooksville*

QUESTIONS:

1. Since sale of beer to minors is prohibited by law, would it be legal for beer to be sold through unattended, coin-operated vending machines, to which minors have access without supervision?

2. Since sale of cigarettes to minors is prohibited by law, would it be legal for cigarettes to be sold through unattended, coin-operated, vending machines, to which minors have access without supervision?

Answering question 1, §562.11, F. S., makes it a criminal offense, "for any person, firm or in the case of a corporation, the officers, agents and employees thereof, to sell, give, serve or permit to be served alcoholic beverages, including wines and beer, to persons under twenty-one years of age or to permit a person under twenty-one years of age to consume said beverage on the licensed premises." It would therefore appear that the proprietor of an establishment in which a beer vending machine is operated, would be criminally liable under §562.11, where minors are knowingly permitted to purchase alcoholic beverages from the machines or such machines are left unattended, thus allowing minors to purchase alcoholic beverages from the machine.

Answering question 2, §859.06 F. S., states:

It is a criminal offense for any person to sell, barter, furnish or give away, directly or indirectly, to any minor, any cigarette, cigarette wrapper or any substitute for either."

Therefore, those who actually participate directly or indirectly, in the selling, bartering, furnishing or giving away of cigarettes to minors are liable under said statute.

The proprietor of an establishment in which a cigarette vending machine is located, would be criminally liable under §859.06, F. S., if he should knowingly allow a minor to purchase cigarettes from the machine or if he should leave the machine unattended so that minors may purchase cigarettes from the machine. In addition thereto, it would appear that the proprietor of cigarette vending machines which are placed in positions that are readily accessible to minors and left unattended so that minors might purchase cigarettes therefrom would also be criminally liable under said statute.

063-24—February 27, 1963

TAXATION

ESTATES OF DECEDENTS—INTANGIBLE PERSONAL PROPERTY TAXES AND TAX LIENS—§§199.07, 199.22 199.23, 192.04, 192.21, 200.02, 733.15, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What is the status of unpaid intangible personal property taxes, assessed against estates of decedents, and the lien thereof, when said estates are closed prior to Nov. 1 of the year for which the assessment was made?

Section 199.07, F. S., makes it the "duty of every person, firm or corporation in this state owning or having the control, management or custody of intangible personal property which is subject to taxation under the laws of Florida, including trustees, executors, administrators, receivers and all other fiduciaries to file a sworn return of the same with the county assessor of taxes in the proper county. . . ." Under this section of the Florida Statutes, executors and administrators of the estates of decedents are required to make return of the intangible personal property held by the executor or administrator of the said estate. For the purposes of this opinion we will confine it to assessments made against the executor or administrator after the beginning of the administration and not assessments made in the name of the decedent. This being true it is doubted that §§733.15, et seq., F. S., relating to notices to creditors and the filing of claims against the personal representative has any application, as the tax obligations arising after the beginning of the administration of a decedent's estate are a claim against the estate and not the decedent.

Section 199.22, F. S., provides, in so far as here material, that "all intangible personal property taxes shall be a lien on all the real and personal property of the taxpayer in the county in which they are assessed from the time they become due . . . and all real property of the taxpayer in every other county from the time that the tax execution is recorded in such other county where the real estate is situated. . . ." Section 199.23, F. S., fixes the lien of tax executions when recorded in accordance with said section and fixes its life at seven years from the time the taxes were due. Section 192.21, F. S., provides that "all taxes imposed pursuant to the constitution and all laws of this state shall be a first lien superior to all other liens on any property against which such taxes have been assessed which shall continue in full force and effect until discharged by payment. . . ." (Emphasis supplied.) Under §192.04, F. S., real and personal property taxes are assessed as of Jan. 1 of the tax year. In *Overstreet v.*

Frederick B. Cooper Co., Fla. App., 114 So. 2d 333, text 334, the court held the 60-day limitation applicable to tangible personal property taxes instead of the 30-day provision in §200.02, F. S., thereby indicating that §192.21, F. S., has general application to real and personal property taxes.

The circuit court of appeals, 5th circuit, in *Tampa v. Commercial Bldg. Co.*, 54 Fed. 2d 1057, construing what is now §192.21, F. S., held that said statute "gives a lien only upon the property against which the tax is assessed, and one claiming a lien on personal property must identify it as the subject of the assessment." Hon. P. Bryan, circuit judge residing in Florida, was a member of the court deciding this case. Where the specific intangible personal property assessed is so identified, in the making of the assessment, that it may be identified and separated from other intangibles of the taxpayer the tax lien encumbering the same would seem to attach as of Jan. 1 of the tax year, otherwise the lien attaches as of the date the taxes become due and payable; usually around Nov. 1 of the tax year.

The status of unpaid intangible personal property taxes, assessed against estates of decedents, and the lien thereof, seem to depend upon the status of the lien securing the payment thereof, when the estate is closed and the personal representative is discharged after Jan. 1 of the tax year and before the following Nov. 1. If the lien for the tax accrued on Jan. 1 of the tax year then the property distributed to heirs and devisees may be followed into their hands, but as such intangible lien accrued on Nov. 1 it is doubtful that such property may be followed for purposes of collection. The nature of the assessment made would doubtless be controlling as to the date of the attaching of the lien.

063-25—February 27, 1963

ELECTION CODE

PROCEDURE FOR HOLDING ELECTION TO DETERMINE
WHETHER SCHOOL SUPERINTENDENTS WILL BE
ELECTED OR APPOINTED—§2B, ART. XII, STATE
CONST.; §§100.011(3), 100.161, 100.342, 101.62
236.32(7), F. S.

To: *Thomas D. Bailey, Superintendent of Public Instruction, Tallahassee*

QUESTIONS:

1. May the referendum on the issue of appointive school superintendents authorized by §2B, Art. XII, State Const., be on the same ballot and held at the same time as the special general election to fill vacancies in the legislature now scheduled for March 26, 1963?

2. Who should bear the expense of the elections authorized by §2B, Art. XII, and may the county school board share in the cost of said elections?

3. What constitutes "a majority vote of the qualified electors" as set out in §2B, Art. XII, State Const.?

4. What notice should be given to the general public prior to the holding of the election authorized by §2B, Art. XII?

5. How should the ballot used in conjunction with the election authorized by §2B, Art. XII, be worded?

6. For what length of time prior to the election authorized by §2B, Art. XII, should absentee ballots be available to electors?

AS TO QUESTION 1:

Section 2B, Art. XII, State Const., provides in part:

(2) The board of public instruction of the county must request an election, *which may be a special election or may be on the ballot of any regular primary or general election* to be designated by the board of public instruction, and upon such timely request the board of county commissioners of such county will call such special election or cause to be placed on the ballot at such other election the proposition whether subsection (1) shall be effective in such county. (Emphasis supplied.)

It is to be noted from the provision just quoted that the referendum under discussion may be called as a special election or it may be put "on the ballot of any regular primary or general election." Since the forthcoming election scheduled for March 26, 1963, is a special general election rather than a *regular* general election as specified in the quoted constitutional provision, the referendum under consideration here could not be put on the same ballot as the candidates to be elected in the special March 26 election. The school referendum under consideration could, however, under the terms of the above quoted constitutional provision, be held as a separate special election on the same day as the presently scheduled special general election.

Insofar as holding the election about which you inquire in conjunction with any other election let me in an effort to be of further assistance, direct your attention to the following quote from AGO 054-22, p. 230 of the 1953-54 biennial report of the attorney general, and AGO 059-156, reported in the 1959-60 biennial report of the attorney general, p. 230:

... It is, therefore, my opinion that the same officials may be appointed by the county commissioners to preside at the polls in both elections, *provided separate ballots and ballot boxes* (in the event voting machines are used, separate ballots should be provided for each election) *are furnished for the special election*. . . . Separate appointment of such officials should be made as to the special election and they should subscribe to a separate oath or affirmation as to each election with respect to their duties to be performed as prescribed by law. (Emphasis supplied.)

These comments concur in substance with the observations contained in my informal letter to you dated Nov. 16, 1962. Question 1 is answered accordingly.

AS TO QUESTION 2:

Normally the expenses of regular elections are borne by the county. See §100.011(3), F. S., unless otherwise provided. See §236.32 (7), F. S.

The school superintendent referendums under consideration here do not fall squarely within the type of election described in §100.011(3), F. S., but on the other hand there does not appear to be any specific provision authorizing payment of the expense of these elections. Should the school boards have funds legally available for election expenditures and desire to share in the expense of said school superintendent referendums, this office would see no objection to their making said funds available for this purpose.

Accordingly, if the elections under consideration here are to be held in conjunction with other elections, the respective costs of the elections would be a matter to be negotiated between the various boards of public instruction and county commissioners in the particular counties involved. The proportionate share of the expenses would undoubtedly vary from county to county, depending upon the number of elections being held on the same day and the proportionate cost of conducting each.

Question 2 is answered accordingly.

AS TO QUESTION 3:

Your attention is directed to *Harris v. Baden*, 156 Fla. 373, 16 So. 2d 608, wherein the court said:

We are of the opinion that the term "a majority of the qualified electors . . ." means a majority of the qualified electors . . . who actually voted upon the measure at election day, not a majority of the voters who may have had the right to vote. . . . (Citing *Bell v. City of Ocala*, 62 Fla. 116, 28 So. 764; *State ex rel Lanier v. Sumter County Com.*, 19 Fla. 518, *Cass County v. Johnston*, 95 U. S. 360, 24 L. Ed. 416; *Carroll County v. Smith*, 111 U. S. 556, 4 S. Ct. 539, 28 L. Ed. 517.)

In the light of the decision quoted above it would appear that the framers of the constitutional provision under consideration here had in mind that the issue would be decided by a majority of those electors participating in the election rather than a majority of those electors registered and eligible to vote. Participation in elections is defined in *State v. Town of Surfside, Fla.*, 104 So. 2d 579, at 581.

Question 3 is answered accordingly.

AS TO QUESTION 4:

It does not appear that the framers of §2B, Art. XII, State Const., set out any provision for notice or advertising in the school superintendent referendum elections. The constitution being organic in nature would supersede statutory provisions relating to notice of other elections and in this instance it would appear that the framers of the constitutional provision intended to vest in the board of public instruction and the board of county commissioners reasonable discretion as to the time and method of giving notice of the referendums in the separate counties in which they will be held.

Section 2B, Art. XII, State Const., provides that the board of public instruction must select the election, whether a special election or regular primary or general election for the referendum. If the request is timely then it is the duty of the county commissioners to either call such special election or place the proposition upon the ballot at such other election. The county commission determines the "timeliness" of the call. It is not bound by §100.342, F. S., or other general law relating to special elections in this respect but only by the constitutional duty to exercise reasonable discretion as to whether there is "timeliness" in respect to the request of the board of public instruction. If and when such determination has been made then the county commissioners should advertise the call and give reasonable notice of such special election on said proposition inserting due newspaper advertisement thereof during the period deemed sufficient by the county commissioners for giving such notice. Although we must in all fairness point out that since this question has not previously been litigated there is a possibility that the courts might rule otherwise.

Question 4 is answered accordingly.

AS TO QUESTION 5:

The ballot for the school superintendent elections under dis-

cussion here should be worded as directed in §100.161, F. S., applicable to constitutional amendments and "other public measure(s)" and should be in the form provided by the secretary of state as directed by this section.

Question 5 is answered accordingly.

AS TO QUESTION 6:

Section 101.62, F. S., relates to absentee ballots and provides in part:

Any elector . . . may make application to the supervisor (of registration) . . . either in person or by mail, at any time during the 45 days preceding any election, but not later than five p.m. on the fifth day preceding such election. . . .

It would appear that the provisions of §101.62, F. S., quoted above answers question 6.

063-26—March 1, 1963

LEGISLATURE

CONTENT AND ENTRIES REQUIRED OF THE JOURNALS OF THE SENATE AND HOUSE OF REPRESENTATIVES—

§§12, 17, 21, 28, ART. III, §§1, 2 and 3 OF ART. XVII, STATE CONST.; §§11.03 and 11.05, F. S.

To: Wilson Carraway, President of the Senate, Tallahassee

QUESTION:

What proceedings and actions of the Florida senate and house of representatives, are required to be reflected by the journals of said houses, and to what extent?

Section 12, Art. III, State Const., requires that "each house shall keep a journal of its own proceedings, which shall be published, and the yeas and nays of the members of either House on any question shall, *at the desire of any five members present, be entered on the journal.*" Section 17, Art. III, State Const., after giving directions concerning the passage of a bill through each house provides, that "the vote on the final passage of every bill or joint resolution shall be taken by yeas and nays to be entered on the journal of each house." Section 21, Art. III, State Const., relative to the notices of application for legislation therein provided for, required that "the fact that such notice was established in the Legislature shall in every case *be recited upon the journals of the Senate and House of Representatives.*" Under §28, Art. III, State Const., relative to veto messages, it is provided that "such objections to be entered upon the journal. . . ." Under §§1, 2 and 3, Art. XVII, State Const., the yea and nay votes, of each house of the legislature, on joint resolutions submitting amendments to the constitution, are to be entered "upon their *respective journals* with the yeas and nays thereon." (Emphasis supplied in each case.)

In *State v. Palmetto*, 99 Fla. 401, 126 So. 781, text 783, the supreme court of Florida stated that "the Constitution requires each House of the Legislature to keep a journal of its own proceedings on which the record of certain actions or proceedings is required to be entered, while other proceedings equally binding upon the Legislature are not required by the Constitution to be entered on the journal." In an Advisory Opinion, 152 Fla. 547, 12 So. 2d 583, text 584, the justices of said court, after quoting from §12, Art. III, State Const., said that "it necessarily follows that the requirement to keep and publish a journal and to record the yeas and nays on any question when requested by five members present is mandatory on both Houses. In all other respects, the contents and publication of the journal may be governed by rule and thereby enlarged or abbreviated within the

discretion of either House." In 49 Am. Jur. 255, §37, we find the statement that "the manner of recording the proceedings and the extent of the fullness of the record are left to the discretion of the legislative bodies, to be controlled by rule respectively of those bodies, or by statute, except as to matters required by the Constitution to be recorded." The same rule was announced by the Oklahoma supreme court in *Atchison, Topeka and Santa Fe R.R. Co. v. State of Oklahoma*, 2 Okla. 94, 113 Pac. 921, 40 L. R. A. (NS) 1, text 13.

Except where otherwise provided by the state constitution, the contents and publication of legislative journals in this state may be governed by rule or regulation of the respective houses or by a statute. The contents of such journals may be enlarged or abbreviated within the discretion of the respective houses or of the legislature. In *State v. Palmetto*, supra, the court stated that "the rule several times announced by this court is: Where the journals are silent, the presumption is in favor of the regularity of the bill, except in cases where the constitution requires the journal to show the action taken." Section 21, Art. III, State Const., did not, prior to the amendment thereof adopted at the general election in 1928, require that the legislative journals reflect that the notice of application for legislation therein required and the proof of the notice given be made a part of the journal entries. In *Stockton v. Powell*, 29 Fla. 1, 10 So. 688, text 697, and *Rushton v. State*, 58 Fla. 94, 50 So. 486, text 487, the court, opinions filed prior to the 1928 amendment, held that it was not necessary that the journals reflect that such constitutional requirements had been complied with. Subsequent to the said 1928 amendments the same court has held that compliance must be reflected by the journals or records and that such showing is material to validity.

Sections 12, 17, 21 and 28, Art. III, and §§1, 2 and 3, Art. XVII, State Const., appear to contain the express constitutional requirements relative to the contents of the legislative journals of the Florida legislature. Under §11.03, F. S., although it is not necessary that the official proofs of the publication of the notices of intention to apply for legislation be entered on the legislative journals it is required that "the fact that such notice in the legislature shall in every case be recited upon the journals of the Senate and House of Representatives." Under §11.05, F. S., the oath required of lobbyists, regulated by said section, is required to be filed with the secretary of the senate and the chief clerk of the house and "said oath shall at once be spread upon the journal of each House for the information of the members of the Legislature."

In *Amos v. Moseley*, 74 Fla. 555, 77 So. 619, text 621, the Florida supreme court posed the question of what is the legislative journal in Florida, and answered by stating that "it is the bound volume which purports to be a copy of all the journals of the entire session, or it is the printed and published pamphlets which contain the record of each day's proceeding. . . . The journal which the constitution requires each House of the Legislature to keep is, therefore, a daily record." It appears to have been the court's view that the daily journals and not the combined publication thereof was the official journal. In *State v. Helseth*, 104 Fla. 208, 140 So. 655, text 659, the court, concerning the reference in §17, Art. III, State Const., said that "this reference to 'journals' means the record of the proceedings of each House as it is daily made and published in pamphlet form and placed each morning upon the desks of the members for correction and approval." Here the court's concern centered around the want of evidence that the published volume was a true and correct copy of the daily journals. In *Amos v.*

Moseley, 74 Fla. 555, 77 So. 619, text 621, where the court remarked that "there is no provision for any official to examine and certify to the correctness of the work of the contractor" who printed and bound the combined journals. However, in *State v. Helseth*, 104 Fla. 208, 140 So. 655, text 659, the court said that "in the absence of any controversy as to what the daily legislative journals (which are printed and distributed each day) disclose, the courts are bound to presume that the printed and bound journals of the Legislature . . . comport with the daily journals, and to consider that such journals are secondary evidence of what the daily journals may have contained, at least in the absence of any showing that there is a difference between the printed and bound journals and the printed daily journals."

From the above and foregoing we must conclude that the specific requirements of the Florida constitution (§§12, 17, 21 and 28, Art. III, and §§1, 2 and 3, Art. XVII, State Const.) as to journal entries must be complied with; "in other respects, the contents and publication of the journal may be governed by rule and thereby enlarged or abbreviated within the discretion of either House." In the advisory opinion reported in 152 Fla. 547, 12 So. 2d 583, text 584, the justices of the supreme court advised the governor that "if the journal entries show the title in full at the time of introduction, at the time it was received by the House other than that in which it originated, at the time of its final passage, the requirement of Section 12 of Article III of the Constitution is fully complied with."

1. Under §12, Art. III, State Const., the yeas and nays of the members of either house on any question shall, *at the desire of five members present*, be entered on the journal. This requirement appears to extend to any question to be voted on.

2. The vote on the *final passage of every bill* or joint resolution shall be taken by yeas and nays to be entered on the journal of each house.

3. The fact that the notice of intention to apply for legislation, required by §21, Art. III, State Const., was established in the legislature shall in every case be recited upon the journals of the senate and house of representatives, except where a referendum is provided for in the bill and no such publication is made.

4. The vote of both houses on vetoed bills shall be entered upon the journal of the house wherein it originated. The objections made by the governor to the bill vetoed by him must be entered upon the journals of the house wherein it originated. These records should reflect the yeas and nays votes.

5. The requirements of §§1, 2 and 3, Art. XVII, State Const., for the entering of the proposed amendment, the yeas and nays vote, and otherwise, should be carefully conformed to.

6. The statement in Advisory Opinion, 152 Fla. 547, 12 So. 2d 583, text 584, as to the contents of the journal entries, should be conformed to; this opinion seems to indicate that the journals should show the title of the bill in full at the time of introduction, at the time it was received by the house other than the one in which it originated, and at the time of its final passage.

7. Except where governed by the state constitution, the legislature by rule or statute may regulate those things not regulated by the constitution.

8. Except where the constitution requires the entry of the title to a bill upon the journal, it may be identified in any other manner as may be provided by statute or rule, and if no such statute or rule in any manner that would lead to its identification.

063-27—March 6, 1963

PUBLIC RECORDS

RECORDING OF DOCUMENTS—CONDOMINIUM, TITLE PAPERS, DEEDS, ETC.—§§28.22, 28.221, 177.05, 192.21, 689.01, 695.01; CH. 177, F. S.; CH. 10040, 1925, LAWS OF FLORIDA

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are the plans, specifications, plats, maps, and title documents relative to and concerning condominium type apartments and their sale and conveyance entitled to record under the statutes and laws of Florida?

The condominium concept of real property ownership "is similar to that of a cooperative, with the principal exception that the individual unit in a multi-family structure is owned by the occupant and can be separately encumbered by a mortgage (as well as separately conveyed). Each unit owner also owns a share in the common area and facilities of the building, such as the land, the foundations, halls, lobbies and stairways. The common areas and facilities remain undivided and are not subject to division. The necessary maintenance of the property and use of the common facilities are governed by agreement between the individual owners of units in the building. The common profits and expenses of the building are distributed among the owners of the individual units" in the building. (See Senate Report 281, Housing Act of 1961, regarding §104 of said act.)

Numerous authorities hold that an owner of an entire estate in real property may sell and convey any part of it; that it may be divided horizontally, perpendicularly, or in any manner according to the will of the owner. Our opinion 061-190, of Dec. 11, 1961, refers to and cites from these authorities. From these authorities cited in said opinion 061-190, it appears valid for the owner or owners of a multi-story apartment building to sell and convey to another an apartment on the second or upper story of such building. We concluded, in said opinion that a deed of conveyance properly executed and delivered by the owner of such an apartment in a multiple-story building in fee, together with a proper share in the common areas and facilities of the building, such as the lands, the foundations, halls, lobbies, stairways, and other common property, conveys an interest in real property within the statutes and laws of the state. Such a conveyance would be an "estate or interest of freehold, or for a term of more than one year, or an uncertain interest of, in or out of messuages, lands, tenements or hereditaments" within the purview of §689.01, F. S., so that any transfer of such interests would have to conform to the requirements of said §689.01. Such a conveyance would be a conveyance, transfer, mortgage or lease of real property within the purview of §695.01, F. S., so that said section must be complied with if the record thereof is to be constructive notice thereof under said §695.01, F. S., and would be within the purview of §§28.22 or 28.221, F. S., depending upon which of said sections the office of the clerk of the circuit court for the county operates.

Chapter 177, F. S., makes provision for the recording of maps or plats of real property in the county, in the office of the clerk of the circuit court, which chapter sets out the requirements concerning such maps or plats. These maps or plats reflect the subdivision of lands into

lots, streets, alleys, blocks, and otherwise, and represent subdivisions and land areas usually tied into government surveys or permanent monuments. The purpose of such maps or plats is to locate areas of land so that the same may be identified and located by reference to the said map or plat, instead of a metes and bounds description. "A 'plat' is a map of a piece of land on which are marked courses and distances of the different lines and the quantity of land it contains." (*Miller v. Lawyers Title Ins. Corp.*, D. Va., 112 Fed. Supp. 221, text 224). "A 'plat' represents an ocular view of the result of a survey, constituting a visual demonstration of the work done." (*Hughes v. Carlsbad*, 53 N. M. 150, 203 P. 2d 995, text 999). "A 'plat' is a division of land into lots, streets and alleys by means of a representation on paper so that they can be identified." (*Northern Indiana Public Service Co. v. McCoy, Ind.*, 157 N. E. 2d 181, text 184).

Provision is made, in Ch. 177, F. S., for the recording in the public records of the counties "maps or plats of any land within this state" and provides the procedure in that connection. Section 177.05, F. S., provides that there shall be written or printed upon the tracing cloth on which the map or plat shall be made a full and detailed description of the land embraced in said map or plat, and "the description must be so complete that from it without reference to the plat, the starting point can be determined and the outlines run." A plat is a map or diagram of real property which has been divided into blocks and streets by the owner for the purpose of selling lots with reference thereto. (21 Fla. Jur. 446, §2.) It appears from 2 *Tiffany Real Property*, 3d Ed., 624 and 625, §626; 16 *Am. Jur.* 443, §9; 26 *C. J. S.* 605, §15; 1 *Thompson on Real Property*, Perm. Ed., 70, §63 and other authorities referred to on AGO 061-190, pp. 2, 3, of December 11, 1961, that real property may be divided horizontally, perpendicularly or in any other manner according to the will of the owner. (See AGO 1961-62, p. 319.)

Chapter 177, F. S., provides for the recording of maps and plats of lands within the state. This statute makes no express requirement that such plats and maps be of the land surface areas; there is no express provision in said chapter prohibiting the making of plats and maps of subsurface areas of land as well as surface areas, or even of areas above the ground, so long as such plats definitely describe each such area, and furnish sufficient information for reestablishing the said plats should reestablishment be necessary. It appears to be within the realms of possibility for a surveyor, or an architect, or both, to survey and plat an air area or areas located specified distances above the ground, or areas within the earth located specified distances below the ground surface, with such certainty that such areas may be located and relocated. A plat of each floor of a multi-story building would doubtless be within the ability of such surveyor or architect; and such plat would doubtless be sufficient to permit the location of each apartment, room, or other portion thereof. Doubtless, an architect, preparing plans for a multi-story building, for example, multi-story apartment building, will survey and prepare plans and specifications of each apartment, room, or area sufficient, by reference thereto, to describe with certainty such apartment, room or area. Such plans and specifications might well be deemed a map or plat of such apartment, room or area, as well as all apartments, rooms and areas within said multi-story apartment building.

Documents transferring or conveying the title to an apartment in a multi-story condominium apartment building, and the undivided interest in the common properties in the said building, as allocated to each apartment, convey the fee title, or such other title as may be speci-

fied, to the apartment purchased and the undivided properties assigned to said apartment, vesting title in the grantee. These interests are not lease or similar interests, but fee title or such other title as may be otherwise specified, and the instruments conveying such interests are in law deeds to real property, and may be so designated on the record, unless otherwise designated by the instrument itself. Conveyances to apartments and the undivided interests in common properties, in condominium type apartment multi-story building, create separate and distinct estates in each grantee, subject to separate taxation.

Prior to the adoption of Ch. 10040, 1925, provisions in taxing statutes, relating to the assessment and collection of ad valorem taxes, were deemed mandatory, requiring strict conformity therewith by the taxing officials. This 1925 act declared that "no act of omission or commission on the part of any tax assessor, or any assistant tax assessor, or any tax collector, or any board of county commissioners, or any clerk of the circuit court . . . shall operate to defeat the payment of said taxes; but any such acts of omission or commission may be corrected at any time. . . ." These provisions of the 1925 act have been carried into §192.21, F. S. The present statute contains the further provision that "all provisions of law now existing or which may be hereafter enacted relating to the assessment and collection of revenue (unless otherwise specifically declared) shall be deemed and held to be directory only. . . ." The plans and specifications of condominium type apartments, being in the nature of a plat or map, may be deemed such for the purposes of assessing the apartments for purposes of taxation. The undivided interests of each apartment owner in and to the common properties of the condominium should be attached to and valued with the apartment which will constitute the taxable value of the apartment and its common properties.

The above stated question is answered in the affirmative.

063-28—March 6, 1963

COUNTY PUBLIC SCHOOL SYSTEM

COUNTY SUPERINTENDENT AS CONSTITUTIONAL
OFFICER IN MONROE COUNTY IF APPOINTIVE
—QUALIFICATIONS—§20, ART. III, §6, ART.
VIII, §§2, 2A, 2B, ART. XII, STATE CONST.

To: *Jack A. Saunders, Representative, Monroe County,
Key West*

QUESTIONS:

1. The office of county superintendent of public instruction is a constitutional office in accordance with §6, Art. VIII, State Const., and provides for his election by the qualified electors of each county. Does the fact that he may be appointed in Monroe county by the school board after a special election remove him from the category of holding a constitutional office?

2. If he is appointed, could the legislature enact a statute wherein basic requirements as to age and educational requirements be maintained for such position as guidelines for the school board, or does §2A, Art. XII, take precedence, and be in violation of §20, Art. III, State Const.?

Committee substitute for house joint resolution 1443 of the 1961 Florida legislature provides, in part:

That article XII of the Florida Constitution be amended as set forth below and that said resolution be submitted to the electors of Florida for ratification or rejection at the general election to be held in November, 1962.

(1) *The county superintendent of public instruction shall be appointed by the county board of public instruction in the counties of Alachua, Charlotte, Collier, Manatee, Orange, Lee, Monroe, Leon, Indian River, St. Lucie, Broward, Baker, Brevard, Hendry and Hillsborough wherein the proposition is affirmed by a majority vote of the qualified electors of any such county making the office of county superintendent of public instruction appointive.* (Emphasis supplied.)

(2) The board of public instruction of the county must request an election, which may be a special election or may be on the ballot of any regular primary or general election to be designated by the board of public instruction, and upon such timely request the board of county commissioners of such county will call such special election or cause to be placed on the ballot at such other election the proposition whether subsection (1) shall be effective in such county.

(3) Any county adopting the provisions of subsection (1) hereof may after four years return to its former status and reject the provisions of this section by the same procedure outlined in subsection (2) hereof for adopting the provisions thereof in the beginning. (Emphasis supplied.)

Section 2, Art. XII, State Const., provides:

Superintendent of public instruction; term. — There shall be a Superintendent of Public Instruction, whose duties shall be prescribed by law, and whose term of office shall be four years and until the election and qualification of his successor. (Emphasis supplied.)

AS TO QUESTION 1:

It would appear that if the amendment to Art. XII of the constitution is implemented in any of the counties included in HJR 1443 of the 1961 legislature that the effect would simply be to change the method of selecting county school superintendents from election by the people to appointment by the county school board.

Under the terms of the amendment to the constitution, if implemented, the office of county school superintendent would still be provided for in the state constitution but the office would be appointive rather than elective.

AS TO QUESTION 2:

In the case of *Thomas v. State, ex rel Cobb, et al*, 58 So. 2d 173 (1952), the Florida supreme court ruled that a statute prescribing qualifications for the office of county superintendent of public instruction in addition to those prescribed by the constitution is invalid.

In my opinion this ruling would apply to the appointive office of county school superintendent under the amended constitution since the amendment does not set forth educational or other requirements for the office in question or authorize the legislature to establish such mandatory qualification. It would appear that if the amendment to the constitution is implemented in any of the counties affected the qualifications of the person appointed to fill the office of county school superintendent must be left to the discretion of the county school board which appoints him.

063-29—March 13, 1963

TAXATION

HOMESTEAD EXEMPTION—JOINT TENANCIES—OCCUPATION BY ONE JOINT TENANT—RIGHTS—§7, ART. X, STATE CONST.; §689.15, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What are the homestead tax exemption rights under §7, Art. X, of the State Const., of persons holding title to real property in this state, in joint tenancy, when only one of the tenants resides on the said real property and makes the same his or her permanent home?

This question raises the issue of the nature of the right, title and interest of a joint tenant in real property held by him and others in joint tenancy. "A joint tenancy and a tenancy in common are alike to the extent that in both cases the co-tenants hold by unity of possession; the essential difference between the two relationships is that joint tenants hold the property by one joint title and in one right, whereas tenants in common hold by several titles or by one title and several rights. They also differ in that the right of survivorship usually exists in the case of a joint tenancy, but not in a tenancy in common." (48 C. J. S. 910, §1). The unities of time, title, interest and possession are common to estates by the entirety and joint estates, "but in an estate by the entirety there is an additional unity, namely, that of person. Strictly speaking, a tenancy by entirety is not a joint tenancy, but is a sole tenancy, and while the two estates resemble each other and possess some qualities in common, yet they differ both in form and substance and are distinguishable." (41 C. J. S. 547, §33).

In *Junk v. Junk*, Fla., 65 So. 2d 728, text 729, the court said that "in tenancy by the entirety all the unities of joint tenancy, including unity of possession, are present and, in addition, there is the unity of person 'springing from the relationship of husband and wife.' " Where property is vested in a husband and wife as a joint tenancy "each spouse owns an interest therein as separate property." (41 C. J. S. 455, §33). "Each joint tenant is seized of the whole estate; he has an undivided share of the whole estate rather than the whole of an undivided share. Each tenant is said to hold per my et per tout, by the half and by the whole." (48 C. J. S. 930, §6).

Under the common law, four co-existing unities were "necessary and requisite to the creation and continuance of a joint tenancy; namely, unity of interest, unity of title, unity of time and unity of possession" (*Kozacik v. Kozacik*, 157 Fla. 597, 26 So. 2d 659, text 661). In 2 Blackstone's Commentaries, 181 et seq., it is stated that "if an estate in fee be given to a man and his wife, they are neither properly joint tenants, nor tenants in common; for husband and wife being considered one person in law, they cannot take by the moieties, but both are seized of the entirety." The statement is made in 48 C. J. S. 930, §6, that "each joint tenant is seized of the whole estate; he has an undivided share of the whole estate rather than the whole of an undivided share."

It is stated in *Kozacik v. Kozacik*, supra, that a "joint tenancy will be terminated by the alienation or conveyance by a joint tenant of his interest in the realty to a stranger, for by such act the unity of title is destroyed and the unity of possession is gone." It seems that the

interest of a joint tenant in property held in joint tenancy may be seized and sold under execution (33 C. J. S. 254, §101; 14 Am. Jur. 169-171, §108). "A levy, and sale of, a joint tenant's interest pursuant to a judgment against him terminates the joint tenancy." (48 C. J. S. 928, §4).

For the purposes of this opinion, we presume that the provision in §689.15, F. S., that "a devise, transfer or conveyance heretofore or hereafter made to two or more shall create a tenancy in common, unless the instrument creating the estate shall expressly provide for the right of survivorship," reestablishes estates of joint tenancy in this state, instead of providing for a right of survivorship in estates in common, and have dealt with the above question on that basis.

Where real property is vested in two or more persons as a joint tenancy, such persons hold the said property as a whole estate, each such person being possessed of an undivided share of the whole estate, instead of the whole of an undivided share. Joint tenants hold by moieties (Black's Law Dict., "Moiety"), which is in the nature of an undivided half of the whole. These moieties are subject to sale, seizure under execution, and are property interests in the property similar in nature to the interests in property held by tenants in common. In joint estates, this interest is an undivided interest in the whole; while in tenancies in common the interest is the whole of an undivided interest. In either case, the interests are separate property interests. In determining homestead tax exemption claims, joint tenants residing on the property differ little, if any, from tenants in common. There would be little difference, for example, in the value of an undivided one-half interest in the whole of the property, and the value of the whole of an undivided one-half interest in the property.

In answer to your question the said joint tenant shall be allowed a homestead tax exemption not to exceed in the words of the constitution "the proportionate assessed value based on the interest owned by such person," applying the formula set out in the above comments.

063-30—March 20, 1963

CRIMINAL PROCEDURE

APPEARANCE BONDS—APPROVAL FEE—§§30.23,
903.34(2), F. S.; §14, D. R. STATE CONST.

To: Bryan Willis, State Auditor, Tallahassee

QUESTION:

May a county judge, sheriff, justice of the peace, or constable collect a fee of \$2.00 for approving appearance bonds from the defendant in a criminal case prior to conviction of said defendant?

By statute the approval of bail bonds by particular officers are acts in criminal cases authorized by §903.34(2). The assessment of cost against the individual defendant in a criminal case is governed by §14, D. R., State Const., which provides "No person shall be compelled to pay cost except after conviction, on a final trial."

In view of the above provisions of the organic law of this state, I am of the opinion that in the absence of conviction and assessment of cost in connection with a final trial of a criminal case there is no authority for a constable, justice of the peace, county judge or sheriff to collect a fee in connection with the approval of an appearance bond from a defendant in a criminal case.

063-31—March 20, 1963

ELECTORS AND ELECTIONS

RESIDENCE AND DOMICILE—PARTICIPATION IN ELECTION WHEN HOME DIVIDED BY BOUNDARY LINE

To: *Joe Oldmixon, Supervisor of Registration, Pensacola*

QUESTION:

When the home which a person calls his residence and domicile has been divided by the boundary line of a precinct, municipality, county or other similar boundary, how do those charged with the responsibility to do so, determine in which precinct, municipality or county said person should be entitled to vote?

In reviewing this matter I do not find where this question has previously been before this office or the courts of Florida. The question has, however, been discussed in respected legal encyclopedia and first I direct your attention to the following observations found at 17A Am. Jur. 257, Domicile, §85:

As has been previously stated, every person must have a domicile somewhere, and can have only one domicile for one purpose at one and the same time. Where a person has his home in a dwelling house which is situated upon a dividing line between political divisions of territory, it is obvious that the situation is a technical one, caused by the purely arbitrary political division, and the rules applied for determining domicile are necessarily more or less artificial. In general, one's residence will be deemed to be in that jurisdiction in which the most necessary and indispensable part of the house is situated. If the line so divides the house that the portion in one jurisdiction is sufficient in itself to constitute a habitation, whereas the other is not, the domicile is in the former jurisdiction. If the line divides the house somewhat equally and it can be ascertained where the occupant habitually sleeps, that is a preponderating circumstance and decisive in the absence of other proof. The occupant has generally no right to select which of the two jurisdictions he will consider his domicile, if the house is so divided by the line that the portion of it in which he lives is distinct from the remaining portion. But if the house is so divided by the line that it is practically impossible to determine on which side the occupant lives, he has the right to elect in which of the jurisdictions he will be domiciled. . . .

Your attention is also directed to the following observations at 29 C. J. S. 42, Elections, §19:

Where the line dividing two election districts runs through an elector's dwelling house, he is entitled to vote in the district in which the larger portion of his residence is situated.

In the case of *East Montpelier v. City of Barre*, 79 Vt. 542, 66 Atl. 100, 10 L. R. A. (N.S.) 874, the facts were as follows: The line passed diagonally through the house, leaving about six-sevenths of it in Barre town. The rear entrance was in Barre town, and the front entrance in Barre City. On the ground floor there was a kitchen, which was the general living room, a bedroom, a pantry, and a woodshed. The woodshed and pantry were wholly in Barre town, and all of the bedroom,

except a small triangular section. The line ran diagonally through the kitchen, leaving a corner of the stove in Barre City. In that case the court said:

A man's dwelling house is the building in which he lives, and in a case like this the legal status of the building as a dwelling place must be determined by the location of that part of the structure *most closely connected with the primary purposes of a dwelling*. . . . (Emphasis supplied.)

Accordingly the court held that the residence was in Barre town because the bedroom, living room and kitchen of the house were located therein.

In *Abington v. North Bridgewater*, 23 Pick. 170, 40 Mass. 170, the court stated:

. . . And we think it settled by authority that if the dwelling house is partly in one place and partly in another, the occupant must be deemed to dwell in that town in which he habitually sleeps, if it can be ascertained.

See also *Chenery v. Waltham*, 8 Cush. (Mass.) 327.

Generally then, it can be seen from the above cited authorities and citing from 14 Cyc. p. 851:

If the line divides more equally, then that portion is deemed the domicile where the occupant mainly and substantially performs those offices which characterize his home (such as sleeping, eating, sitting, and receiving visitors); but in the event of a still closer division, then that part where he habitually sleeps is so considered in the absence of other facts showing a positively contrary intention.

The minority view seems to be that where a person's house is divided he may have the opportunity to select the political subdivision in which he wishes to vote. See *Application of Davy*, 21 Ad. 137, 120 N.Y.S. 2d 450, wherein the judge speculated in dicta that he doubted the New York courts would draw so fine a line as did the California court in *Gray v. O'Banion*, 23 Cal. App. 486, 39 P. 977, and *East Montpelier v. City of Barre*, supra, and that an owner in New York might successfully claim voting residence in either subdivision. See also 17A Am. Jur. 258, *Domicil*, §85. This office believes that to follow the minority view would lead to confusion and that the majority view and generally accepted rule quoted above provides a more orderly method for determining a person's actual domicile for voting purposes.

Accordingly in this instance this office would be inclined toward the position that the electors in question should be deemed residents of that electoral district wherein that portion of their domicile is located in which they perform and carry out those activities which are substantially indicative of home life, i. e., sleeping, eating, etc., and in those instances where the line so finely divides the home then the elector's residence should be deemed to be in that precinct, municipality or county in which the elector sleeps.

063-32—March 20, 1963

TAXATION

ESTATE TAXES—CONTRACTS FOR THE SALE AND CONVEYANCE OF REALTY—MEASURE OF THE TAX— CH. 198, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What is the measure of estate taxes due this state, where the nonresident owner of real property in Florida died, after having entered into a contract for the sale and conveyance of said realty to another, when the unpaid balance due the decedent at the time of his death was principal in the sum of \$396,199.20 and interest to the date of his death in the sum of \$2,182.91?

In this state a mere contract for the sale of realty will not effect a transfer of the legal title thereto, which remains in the vendor until he has executed a conveyance sufficient to pass the legal title thereto (91 C. J. S. 1009, §106). The relation created by a contract for the sale and conveyance of real property in this state is that of vendor and purchaser, which vests the vendee with the equitable title to the property described in the contract (*Lafferty v. Detwiler*, 155 Fla. 95, 20 So. 2d 338, text 343; *Marion Mtge. Co. v. Grennan*, 106 Fla. 913, 143 So. 761, text 766; *Miami Bond and Mtge. Co. v. Bell*, 101 Fla. 1291, 133 So. 547, text 548; *Schmidt v. Kibben*, 100 Fla. 1684, 132 So. 194, text 196; *Felt v. Morse*, 80 Fla. 154, 85 So. 656, text 658). In *Felt v. Morse*, 80 Fla. 154, 85 So. 656, text 658, the court quoted with approval from *Brewer v. Herbert*, 30 Md. 301, 96 Am. Dec. 582, that "from the time the owner of an estate enters into a binding agreement for its sale, he holds the same in trust for the purchaser, and the latter becomes a trustee of the purchase money for the vendor, and being thus in equity the owner, the vendee must bear any loss which may happen, and is entitled to any benefits which may accrue to the estate in the interim between the agreement and the conveyance." To the same effect see also *Lafferty v. Detwiler*, supra; *Marion Mtge. Co. v. Grennan*, 106 Fla. 913, 143 So. 761, text 766; *Standard Lbr. Co. v. Florida Indus. Co.*, 100 Fla. 884, 141 So. 729, text 732; *De Huy v. Osborne*, 96 Fla. 435, 118 So. 161, text 165; *Latin-American Bank v. Rogers*, 87 Fla. 147, 99 So. 546, text 547.

The supreme court of Florida, in *Hull v. Maryland Casualty Co.*, Fla., 79 So. 2d 517, text 518, stated that "by ordinary common law principles, the doctrine of equitable conversion becomes operative upon entry of an agreement to convey title to realty. The vendee immediately becomes the beneficial owner, and the vendor retains only naked legal title as security for the payment of the purchase price." The district court of appeal, 1st Dist., in *Tingle v. Hornsby*, Fla. App., 111 So. 2d 274, text 276, stated that "it has long been the law of this jurisdiction that the vendor's act in executing a contract to convey the legal title to property upon the payment of an agreed purchase price constitutes the vendee as the real beneficial owner. . . . Under the doctrine of equitable conversion, the vendor's interest thereupon becomes personalty." See also 33 Fla. Jur., 461-464, §§101-103. In *Miami Bond and Mtge. Co. v. Bell*, 101 Fla. 1291, 133 So. 547, text 548, it is stated that until the terms of a contract to sell and convey realty "are complied with, the legal title remains in the vendor as his security, or,

as it is otherwise expressed, he has a lien upon the vendee's equitable estate as security for the payment of the purchase price."

In *Michaels v. Albert Pick and Co., Fla.*, 30 So. 2d 498, text 500, the court stated "this court held, in *Latin American Bank v. Rogers*, 87 Fla. 147, 99 So. 546, 547, that the title of an owner who has entered into an executory contract to convey land, is subject to levy and sale as 'lands and tenements' under execution. It has also further held, in *Miller v. Berry*, 78 Fla. 98, 82 So. 764, that the lien of a judgment under the statutes of Florida is effective only to the beneficial interest of the judgment debtor in real estate." In *Bancroft Inv. Corp. v. Jacksonville*, 157 Fla. 546, 27 So. 2d 162, text 168, the court held that prior to the time the purchase price is paid in full by the vendee "the estate of the vendor in and to the property is such that the land is subject to levy and sale under execution as 'lands and tenements.'" In *Marion Mtge. Co. v. Grennan*, 106 Fla. 913, 143 So. 761, text 766, and in *Bancroft Inv. Corp. v. Jacksonville*, supra, recognized that after the execution of a contract as above described with the vendee in possession, the vendor continues holding such an interest in the property sold as may be mortgaged; however, the mortgagee acquires a lien on such lands "subject only to the right of the vendee to demand a conveyance when he has fulfilled his contract."

It has been stated that "rights, interests and estates which descend (at common law) as real property include the interest of a vendee in a contract for the purchase of land," (26A C. J. S. 539, §9, note 49), while the "interest of the vendor in a contract for the sale of realty descends as personalty," (26A C. J. S. 540, §9, note 60). The supreme court of Alabama, in *Flormerfelt v. Siglin*, 155 Ala. 633, 47 So. 106, text 108, said that "in the case of the death of the vendee before the conveyance has been made, his interest in the land should be considered as real estate and descend to his heir, or he may devise the same by will; in the case of the vendor's death, where he is under contract to sell land, his heirs receive the title in trust for the vendee, and must convey upon the payment of the purchase money, but the purchase money goes, not to the heir, but to the personal representative of the vendor, for the vendor's interest has been converted by the contract from realty to personalty." In 19 Am. Jur. 15, §15, it is stated that the "vendor's interest under a contract for the sale of land constitutes personalty and on his death is distributable as such, together with the unpaid purchase money and securities therefor." Cases cited in Ann. in 57 L. R. A. 646 and Ann. Cas. 1914D, 419 and 420 support the above references.

From the above and foregoing, it is clearly evident that for the purposes of descent and distribution the interest of the vendee of real property, under a contract to sell and convey to him will be, under the doctrine of equitable conversion, converted into realty for the purposes of descent and distribution and should be treated as realty for such purposes. On the other hand for purposes of descent and distribution, the interest of the vendor will be converted into personalty, under the same rule, and for purposes of descent and distribution should be treated as personalty.

Under the law as above announced the sums of \$396,199.20, as principal and \$2,182.91, as interest, due from the vendee to the vendor was, upon the death of the vendor, under the laws of this state, converted into personalty for the purpose of the administration of the estate of the deceased vendor and passed to the personal representative as personalty and not to the heirs as realty. These sums appear to have been evidenced by a written agreement, if not by promissory

notes, which have the status of intangible personal property and have their situs at the residence of their owner. When the said vendor died, such obligations had their situs at his then domicile, and passed to his personal representative there upon his death. The vendor held the legal title to the lands described in the contract of sale, merely for the purpose of securing the payment of the said indebtedness. Title passed to his heirs in Florida merely for the purpose of securing the payment of these obligations.

We are, therefore, of the opinion that the unpaid balance due on the said contract may not be considered as the value of real property located in this state and subject to taxes imposed by Ch. 198, F. S.

063-33—March 25, 1963

REGULATION OF TRADE AND COMMERCE

RETAIL INSTALLMENT SALES, FINANCING—BANKS AND
BANKING—APPLICATION, ETC.—§§520.01-520.13,
520.30-520.42, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May Florida banking institutions directly finance the purchase of motor vehicles and goods, wares and merchandise, under §§520.01-520.13, and 520.30-520.42, F. S.?

A retail installment transaction, under §§520.01-520.13, is defined, in §520.02 thereof, as "any transaction evidenced by a retail installment contract entered into between a retail buyer and a retail seller wherein the retail buyer buys a motor vehicle from the retail seller at a time sale price payable in one or more deferred installments. . . ." A retail seller is defined in §520.02 as a person engaged in the business of selling motor vehicles to retail buyers in retail installment transactions. Finance charges are defined in said section as "the amount agreed upon between the buyer and the seller . . . to be added to the cash sales price. . ." A sales finance company, as defined in said §502.02, "means a person engaged in the business of purchasing retail installment contracts from one or more retail sellers." Similar terms used in §§520.30-520.42, F. S., are used and defined in §520.31, F. S., relating to the retail installment sales of goods, wares and merchandise other than motor vehicles. Under §520.38, F. S., a retail seller, under said §§520.31-520.42, may assign, pledge, hypothecate, or otherwise transfer a retail installment contract or revolving account to any person, firm or corporation on such terms and conditions and for such price as may be mutually agreed upon.

We find nothing in the above statutes relating to the direct financing of purchase installment contracts, under either of said statutes and laws, indicating an intention or plan for direct financing between banking institutions and the retail buyers above mentioned. Neither of the mentioned statutes authorize loans direct to buyers by the banking institutions at the interest or other rates of interest mentioned in the said statutes.

The above question is answered in the negative.

063-34—April 3, 1963

TAXATION

TAX EXEMPTIONS—NURSERY SCHOOLS AND KINDERGARTENS AS EDUCATIONAL INSTITUTIONS—§1, ART. IX, §16, ART. XVI, STATE CONST.; §192.06, 228.041(1), 232.04 AND 232.05, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. When are nursery schools and kindergartens operated in this state entitled to exemption from taxation as educational institutions within the purview of §1, Art. IX, and §16, Art. XVI, State Const.?

2. What standards must nursery schools and kindergartens, operated in this state, meet to entitle them to exemption from ad valorem taxation under the laws of Florida?

Florida is a democracy in which every parcel of property in the state is expected to bear its due portion of the burden of government, *unless exempted* by statute, in the manner provided by §1, Art. IX, State Const. (*Bancroft Inv. Corp. v. Jacksonville*, 157 Fla. 546, 27 So. 2d 162, text 170), or is entitled to tax exemption under the terms of §16, Art. XVI, State Const., which section provides that all *corporate* property is subject to taxation "unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." Section 1, Art. IX, State Const., as implemented by §192.06, F. S., provides for tax exemption for noncorporate owners under like circumstances. These constitutional provisions have been "construed as a limitation upon the power of the legislature to provide for the exemption from taxation of any classes of property except those particularly mentioned classes specified in the organic law itself." (*L. Maxcy, Inc. v. Fed. Land Bank*, 111 Fla. 116, 150 So. 248, text 250; *State v. St. John*, 143 Fla. 544, 197 So. 131, text 134; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304). Except, where otherwise expressly provided in the state constitution.

If nursery schools and kindergartens are entitled to tax exemption they must be operated as religious, scientific, municipal, educational, literary or charitable institutions, and their property must be held and used for one or more of said mentioned purposes. We are here concerned with the question of whether or not the nursery schools and kindergartens in question are in fact and in law educational institutions, and whether their property is held and used exclusively for educational purposes. To be entitled to tax exemption, privately owned and operated nursery schools and kindergartens must operate as educational institutions, offering courses like or comparable to the courses contemplated by the school code of this state for public nursery schools and kindergartens (1961-1962 AGO 402; 062-37, of Feb. 26, 1962); their primary purpose and operation must be educational and not for profit, however, an incidental profit will not of itself defeat the right to tax exemption (1959-1960 AGO 649; 060-130, of Aug. 8, 1960); and reasonable fees may be charged by those operating educational institutions of students attending the institution (1947-1948 AGO 191; 048-133, of April 21, 1948). In *Lummas v. Florida Adirondack School*, 123 Fla. 832, 168 So. 232, text 239 and 240, the court

remarked that "certainly it was never contemplated that these institutions (private schools) could operate with no source of revenue, and certainly it was known and contemplated that such institutions, the property of which was held and used exclusively for educational purposes would be required to charge and collect tuition from those who were able to afford to pay for the privilege offered. It was also known that those engaged in the profession of teaching and conducting these private educational institutions, whether being conducted by one person in a single room or by an organization in several rooms or houses, would be required to arrange matters to make their employment in the enterprise a means of earning a livelihood."

In *Rast v. Hulvey*, 77 Fla. 74, 80 So. 750, and *Amos v. Jacksonville Realty and Mtge. Co.*, 77 Fla. 403, 81 So. 524, the court denied tax exemption where a private school was operated on certain parcels of land, because the property was not entirely used for educational purposes, a portion of the property being used by the owner and principal of the institution as his homestead and another parcel being rented to a tenant. However, in *Rast v. Hulvey*, *supra*, the court remarked that "we do not mean to say that the grounds and buildings used for educational purposes would not be embraced within the scope of the statutory exemption merely because some person or persons were living on the property or in the building as caretaker, even though it might be considered the home of the caretaker, nor could it be considered that it was not being used for educational purposes solely if there were rooms in the building or buildings on the property used as bedrooms or sleeping apartments for the officers and students attending the school." So far as appears from the opinions in these cases the building used as the homestead of the owner and principal was not connected with the operation of the schools, and was occupied by the owner and principal as his homestead. In *Lummas v. Florida Adirondack School*, 123 Fla. 832, 168 So. 233, text 235, it is evident that the superintendent, the caretakers, instructors and others engaged in the operation of the school, were housed on the school premises; however, there appears to have been no homestead claims made by them or any of them. These cases seem to establish the rule that a homestead claim against a part of the school grounds could be contrary to a claim that the property is held for educational purposes.

In *Rast v. Hulvey*, *supra*, and in *Amos v. Jacksonville Realty and Mtge. Co.*, *supra*, tax exemption was denied on the entire property because a portion of it was used for other than educational purposes; there was no severance or attempted severance of the part used for educational purposes from that used for other purposes. However, in *State v. Doss*, 150 Fla. 491, 8 So. 2d 17, text 18, the court said "by the best reasoned authority in this country when a property is owned by a *charitable association* or corporation and part of it is used for the purposes of the association and the balance is used for commercial and profit purposes, if severable that part used for the purposes of the corporation, that is to say for religious, scientific, municipal, educational, literary or charitable purposes, may be exempt from taxation while that part used for profit may be taxed. . . . We approve this rule." (Emphasis supplied.) This rule was followed in *Simpson v. Bohon*, 159 Fla. 280, 31 So. 2d 406, where 56.9% of the value of a building was exempted from taxation and 43.1% was taxed. It seems reasonable to believe that the rule followed in *Rast v. Hulvey*, and *Amos v. Jacksonville Realty and Mtge. Co.*, *supra*, was amended by the court in *State v. Doss*, *supra*.

Under §228.041(1), F. S., the "state system of public education

... consists of nursery schools and kindergarten classes; elementary and secondary grades; ..." Under §§232.04 and 232.05, F. S., children between the ages of three years and nine months and four years and nine months are classified as being within the jurisdiction of nursery schools, and children between four years and nine months and about five years and nine months are classified as being within the jurisdiction of kindergarten classes. No doubt the nursery schools and kindergarten classes provided by §232.04 and 232.05, F. S., were intended by the legislature to be educational institutions, within the public school system of the state, and the courses taught by them to be educational in nature.

From the above mentioned constitutional and statutory provisions, and the authorities cited and quoted from, we conclude that:

Nursery schools and kindergartens owned and operated in this state, by persons, firms and corporations, which offer educational courses meeting the requirements of publicly-operated nursery schools and kindergartens in substance, whose primary purpose and intent is educational and not profit, as above discussed, are entitled to exemption from taxation as educational institutions within the purview of §1, Art. IX, and §16, Art. XVI, State Const., provided, they meet the standards required of nursery schools and kindergartens, operated under the Florida school code, and the courses of study required under said school code.

To entitle nursery schools and kindergartens to tax exemption they must offer something more than baby sitting and custodial services; they must offer educational courses like or similar to those courses offered by publicly-operated nursery schools and kindergartens.

063-35—April 4, 1963

REGULATION OF TRADE AND COMMERCE

APPLICATION OF MOTOR VEHICLE SALES ACT TO FACTORS—LICENSES AND LICENSE TAXES—§§520.01-520.13, 205.59, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Are §§520.01-520.13, F. S., applicable to motor vehicles sold by factors or commission merchants to purchasers thereof?

2. What licenses and license taxes should be required of factors or commission merchants selling motor vehicles for their principals?

In *Gadsden County Tobacco Co. v. Corry*, 103 Fla. 217, 137 So. 255, text 257, the court defined a factor as "one whose business is to receive and sell goods for a commission. He differs from a broker, in that he is entrusted with the possession of the goods to be sold, and usually sells them in his own name. He is invested by law with a special property in the goods to be sold. ..." In 35 C. J. S. 496, §1 a "factor" is defined as "an agent who, in pursuance of his usual trade or business, and for a compensation, sells goods or merchandise consigned or entrusted to his possession for that purpose by or for the owner." This rule was applied to automobiles delivered by third persons to an automobile dealer to be sold by him for their account

in *Pacific Finance Co. v. Foust*, 44 Cal. 2d 853, 285 P. 2d 632, and *Kenny v. Christianson*, 200 Cal. 419, 523 P. 715, 50 A. L. R. 1297, and by a court of appeals in *Siegel v. Bayless*, 113 Cal. App. 2d 661, 248 P. 2d 968. "In the absence of usage or instructions to the contrary, a factor may sell in his own name, as well as in the name of his principal, the goods entrusted to him for sale." (35 C. J. S. 513, §11). In this connection see also *Gadsden County Tobacco Co. v. Corry*, *supra*.

Section 520.02(3), F. S., is a part of the Florida motor vehicle sales finance law, and provides that, when used in said law, the term "retail installment seller" or "seller" means "a person engaged in the business of selling motor vehicles to retail buyers in retail installment transactions." The terms "retail installment transaction" and "retail installment contract" and similar words, as used in §§520.01-520.13, F. S., are defined in said §520.02, F. S. Installment sales of motor vehicles, made by and through factors or commission merchants, must conform to the requirements of said §§520.01-520.13, F. S. Installment sales of motor vehicles made by or through a factor or commission merchant must conform to and are regulated by said §§520.01-520.13, F. S., whether made in the name of the factor or in the name of the principal or owner of the motor vehicle sold. A factor selling motor vehicles in his own name and not disclosing the name of the principal or owner of the motor vehicle would be clearly a retail seller within the purview of said §§520.01-520.13, F. S., when the consideration is payable in installments, requiring the licensing of the factor or commission merchant under §520.03, F. S. However, should it appear that the sales were made by and through an agent of a duly licensed motor vehicle dealer, and not by and through a factor or commission merchant, then no licensing under said §520.03, F. S., would be required, other than that of the said licensed motor vehicle dealer.

A factor or commission merchant, in the absence of an agreement or instructions as to the time, manner and terms of sale, is at liberty to sell at such time, in such manner and on such terms as he may deem proper in the exercise of a sound discretion (35 C. J. S. 527, §28); an agent may exercise no such discretion but must conform to the instructions of his principal. An important distinction between a factor and an ordinary agent is that the factor must have possession of the property to be sold, while an ordinary agent need not have such a possession (35 C. J. S. 499, §1). Whether the relation between two parties is that of a factor or that of an agent must be determined from the facts in each case.

Sections 520.01-520.13, F. S., are applicable to the sale of motor vehicles by a factor or commission merchant when such factor or commission merchant is engaged in the business of selling motor vehicles through retail installment transactions, and such factors must be licensed under §520.03, F. S. Whether a sale is made by or through a factor, or through a mere agent of the owner, is largely a question of fact to be determined from the facts in each case. This answers question 1.

Motor vehicles are tangible personal property, within the purview of §205.59, F. S., which provides that "every person engaged in the business of trading, buying, bartering, serving, or selling tangible personal property as owner, agent, broker, or otherwise, shall pay a license tax" in the amount provided in and by said section. This section of the Florida Statutes clearly embraces factors and commission merchants selling motor vehicles for others. This answers question 2.

063-36—April 8, 1963

TAXATION

EXEMPTIONS—DEFINITION OF "MUNICIPAL PURPOSE" AS USED IN §1, ART. IX, and §16, ART. XVI, STATE CONST.—§192.06, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What is a municipal purpose within the purview of §1, Art. IX, and §16, Art. XVI, State Const., relating to taxes and tax exemptions?

Section 1, Art. IX, State Const., provides, in so far as here material, that the legislature of this state, in connection with the imposition of ad valorem taxes, "shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, exempting such property as may be exempted by law for *municipal*, educational, literary, scientific, religious and charitable purposes." This constitutional provision has been implemented by §192.06(2), F. S., that "all public property of . . . cities, villages, towns, . . . in this state, *used or intended for public purposes*," shall be exempt from taxation. Under §16, Art. XVI, State Const., "the property of all corporations . . . whether heretofore or hereafter incorporated, shall be subject to taxation unless such property be held and used exclusively for religious, scientific, *municipal*, educational, literary or charitable purposes. Neither of said constitutional provisions define what is or what is not a municipal purpose.

The said constitutional provisions have been "construed as a limitation upon the power of the legislature to provide for the exemption from taxation any classes of property except those particularly mentioned classes specified in the organic law itself." (State v. Doss, 146 Fla. 752, 2 So. 2d 303, text 304; State v. St. John, 143 Fla. 544, 197 So. 131, text 134; L. Maxcy, Inc. v. Federal Land Bank, 111 Fla. 116, 150 So. 248, text 250). In State v. St. John, supra, it was stated that "while the organic law intends that the governmental functions and property of *municipalities* shall not be taxed, the constitution does not exempt the corporate business or *proprietary activities* of municipalities." (Emphasis supplied.) In the same case it was further stated that the "constitution exempts from taxation, *not municipal corporations as such*, but property that is *held and used exclusively* by them for *municipal purposes*." (Emphasis supplied.)

In Panama City v. Pledger, 140 Fla. 629, 192 So. 470, certain municipal real property was leased by the City of Panama City, to the Southern Kraft Corp., a manufacturer of kraft paper in said city, for a period of 50 years with an option for the extension thereof for an additional 49 years. Rentals were payable by the corporation to the city for the use of the property. Under the said lease the corporation was to provide, on the leased properties, a public dock and docking facilities. The court held that the properties were not being held and used for a municipal purpose sufficient to entitle them to tax exemption. In City of Lakeland v. Amos, 106 Fla. 873, 143 So. 744, text 747, the court remarked that "the constitution exempts from taxation *not municipal corporations*, but property that is *held and used exclusively for municipal purposes*." "Municipal purposes" have been defined as *public or governmental purposes*, as distinguished from *private pur-*

poses. (Georgia R.R. and Power Co. v. Atlanta, 154 Ga. 731, 115 S. E. 263, text 271; State v. Hagerman, 155 Ohio St. 320, 98 N. E. 2d 835, text 828; Cook v. Portland, 20 Or. 580, 27 P. 263, text 264). In Harper v. McDavid, 145 Fla. 605, 200 So. 100, text 102, "municipal purposes" was held to comprehend all activities essential to the health, morals, protection and welfare of the municipality and its residents.

It is evident from Panama City v. Pledger, supra, that for property, but to its use for one or more of the above mentioned purposes. *be entitled to tax exemption* it must be actually held and used for some municipal, educational, literary, scientific, religious or charitable purpose or purposes. Municipal ownership alone not being sufficient for the tax exemption thereof. The tax exemption runs, not to the property, but to its use for one or more of the above mentioned purposes. The primary use of such property must be for one or more of the above stated purposes. Use for United States or Florida, including their governmental agencies, would be in the nature of a municipal use when determining tax exemption rights, and should be deemed to be within the purview of §1, Art. IX, and §16, Art. XVI, State Const.

The supreme court of South Carolina, in *Ellerbe v. David*, 193 S. C. 332, 8 S. E. 2d 518, had before it an act of South Carolina exempting farm lands in that state on which crops were largely destroyed by hail during the previous tax year. Section 1, Art. X, of the South Carolina constitution, authorized the exemption from taxation of property used for municipal, educational, literary, scientific, religious or charitable purposes. In its opinion in this case the South Carolina court said that "the term 'municipal purposes' as used in this section of the Constitution is the equivalent of, or fairly embraces county purposes; that is, an exemption for county purposes is an exemption for municipal purposes if within the scope of the legitimate governmental purposes of a county for which the Legislature may provide by law." *Duke Power Co. v. Bell*, supra. A municipal purpose intended to embrace some of the functions of government, local or general." The said South Carolina law was held in violation of said constitutional provision and void.

In *Miami Battlecreek v. Lummus*, 140 Fla. 718, 192 So. 211, text 217, the supreme court of Florida quoted with approval from the opinion of the supreme court of Illinois in *Congregational Sunday School, etc. v. Board of Review*, 290 Ill. 108, 125 N. E. 7, text 10, that "the fundamental ground upon which all exemptions in favor of charitable institutions are based is the benefit conferred upon the public by them, and the consequent relief, to some extent, of the burden upon the state to care for and advance the interests of its citizens." To the same general effect see also *Moffett v. Ashby*, Fla., 139 So. 2d 133, text 135, and *Coppock v. Blount*, Fla., App. 3rd, 145 So. 2d 279, text 282.

For real properties leased by a municipal corporation to persons, firms and corporations to be entitled to tax exemption, in whole or in part, the use to which such property is put by the grantee must be also a use for a municipal purpose; the fact that the municipality receives rental payments for the use of the said property, under the rule announced in *Panama City v. Pledger*, supra, is not a sufficient municipal use. Property leased by a municipality to the U. S. for Army reserve purposes or for coast guard purposes, when used for such purposes, would be for a public use commensurate to a municipal use. Under normal circumstances municipal property leased to others by a municipality for baseball purposes, gasoline stations, swimming pools

and concessions, restaurants, bait and tackle shops, driving ranges and miniature golf courses, cocktail bars, and other private and semi-private ventures, is not used for municipal purposes within the purview and intention of §1, Art. IX, and §16, Art. XVI, of the State Const. Whether such leased property is entitled to tax exemption, or is subject to taxation, depends entirely on whether the property leased is or will be used exclusively for some municipal, religious, scientific, educational, literary or charitable purposes; "municipal purposes" being discussed above.

063-37—April 8, 1963

REGULATION OF VOCATIONS AND PROFESSIONS

AUTHORITY INVOLVING BARBERS' SANITARY COMMISSION TO HOLD HEARINGS UNDER §§476.25-476.32, F. S., FOR FIXING MINIMUM PRICES

To: George W. Ryals, Chairman, Barbers' Sanitary Commission, Tallahassee

QUESTION:

Does the barbers' sanitary commission have the legal authority under the provisions of §§476.25-476.32, F. S., to conduct hearings for the purpose of adopting rules, regulations or orders relating to the economic conditions existing in barber shops in the state?

According to the provisions of §§476.25-476.32, F. S., the legislature vested the barbers' sanitary commission with the responsibility to investigate and determine whether the economic practices prevailing among barbers and the hour of operation of barber shops were such as to require the adoption of rules, regulations and orders relating to such matters. This investigation was dependent upon the filing of a petition by 66% of all registered barbers in the particular county affected, after which filing a hearing could be conducted.

The said sections were originally enacted in 1941 (Ch. 20425, 1941). In 1943, the supreme court of Florida had occasion to construe the provisions of these sections, particularly those relating to economic practices and the opening and closing hours of barber shops (*Robbins v. Webb's Cut Rate Drug Co.*, 16 So. 2d 121). The court held that the provisions of §§476.25-476.32, F. S., were invalid as violating the requirements of due process in that said sections failed to require the barbers' sanitary commission to give notice to the public as well as the barbers of hearing which it was authorized to hold in connection with "fixing minimum prices for barber services and the time for opening and closing barber shops." In this regard the court specifically stated:

This Court and the Supreme Court of the United States have repeatedly held that the public is vitally interested in all regulations of administrative boards fixing prices for services or commodities and that such notice and hearing must be given the public in strict compliance with the law. *The law must require notice and give opportunity to be heard; it is not enough that the public get it by chance.* Otherwise the requirements of due process fail. . . (Citations omitted.) (Emphasis supplied.)

In particular the court construed the provisions relating to economic practices declaring the aforementioned sections to be unconsti-

tutional for the following reason:

The act under review leaves to the unrestrained discretion of the Barbers' Sanitary Commission the power to define "unfair or unreasonable economic practices" and "what tends to make insecure the economic status of the barbers therein." These terms or phrases have no set meaning in law or in common usage. *To vest in a Commission the unbridled discretion to define such terms without any rule or standard whatever to guide them is a clear delegation to enact the law or define what it shall be; in other words, a delegation of straight legislative power which will not be permitted.* The legislature cannot abdicate that which the Constitution vests in it exclusively . . . (Citations omitted.) (Emphasis supplied.)

The effect of the adjudication of unconstitutionality is such as to eliminate the portion of the statutes which conflicts with the organic law and to render the said statute inoperative by the supremacy of the constitution (State v. Greer, 102 So. 739, 6 Fla. Jur., Constitutional Law, §88).

In light of the foregoing statements, it is my opinion that the declaration of invalidity of those portions of §§476.25-476.32, F. S., relating to the holding of hearings to determine whether unfair or unreasonable practices prevail among barbers or barber shops in a particular county, renders such sections inoperative and thereby removes the legal authority or basis upon which the commission may predicate any action relating thereto. Furthermore, serious doubt would be created with respect to the expenditure of public funds to conduct hearings, the subject matter of which has been declared by the courts of this state to be improperly delegated to administrative boards.

Your question is, therefore, answered in the negative.

063-38—April 10, 1963

TAXATION

DOCUMENTARY STAMP TAXES—INSURANCE PREMIUM FINANCING ARRANGEMENTS AND AGREEMENTS— §§201.08, 520.30-520.42, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are contracts entered into between insurance policy holders and insurance agents with money lenders whereunder the money lenders bind themselves to advance funds to be used in the payment of insurance premiums, subject to documentary stamp taxes under §201.08, F. S.?

Under the "premium account agreement" form, handed us with the request for opinion, the finance company "agrees to loan and advance from time to time" to policy holders and to insurance agents to be advanced to policy holders, funds to be used in the payment of insurance premiums due or to become due from such policy holders to the insurers, such advances to bear "interest at the rate of one-half of one per cent per month on the unpaid balance" from time to time owing and unpaid. The amount of the advances to be made from time to time is dependent upon the needs of the policy holder and the amount of premiums due from him from time to time. There is nothing appearing from the file before us that prevents the policy holder from

paying premiums from his own funds instead of with funds advanced by the finance company. Under the premium account agreement, above mentioned, no obligation arises as against the policy holder, unless and until he obtains an advance of funds from the finance company. It seems possible that finance agreements may be entered into between the finance company and a policy holder who may never require or obtain an advance of funds from the finance company, in which case no obligation would arise between the policy holder and the finance company.

The written obligation to pay money of the policy holder or insurance agent is not for the payment of a fixed and liquidated obligation, but of an amount or amounts to be subsequently fixed and determined from advances to be made after the execution and effective date of the "premium account agreement" above mentioned. Section 201.08, F. S., imposes a documentary stamp tax "on promissory notes, nonnegotiable notes, *written obligations to pay money*, assignments of salaries, wages and other compensation, made, executed, delivered, sold, transferred or assigned in the state" at the rate of 10¢ per \$100 thereof. The "premium account agreement," entered into by and between the policy holders and insurance agents and the finance company, are written obligations for the payment of money within the purview of said §201.08, F. S.

This statute was before the U. S. circuit court of appeals, 5th Circuit, in *Lee v. Kenan*, CCA 5th, 78 Fed. 2d 425, involving an agreement for the purchase of electricity, the compensation for the same being dependent upon the amount used, which was held to be only an executory agreement for the sale of a commodity, and no obligation to pay money arises under it until the commodity is delivered. This contract was held not to evidence a debt or monetary obligation of a fixed and certain amount, and therefore not subject to taxation, evidently because the amount of the tax to accrue could not have been ascertained at the time of execution. The court, referring to *U. S. v. Isham*, 84 U. S. (17 Wall) 496, text 504, 21 L. ed. 728, text 730, quoted therefrom with approval, that "the liability of an instrument to a stamp duty, as well as the amount of such duty, is determined by the form and face of the instrument, and cannot be affected by proof of facts outside of the instrument itself." See also *Banker's Trust Co. v. Florida East Coast R.R. Co.*, DC Fla., 8 F. Supp. 874, to the same effect. In *Metropolis Pub. Co. v. Lee*, 126 Fla. 107, 170 So. 442, text 444, the Florida court remarked that in *U. S. v. Isham*, supra, "it was held that the liability of an instrument to a stamp duty, as well as the amount of such duty, is determined by the form and face of the instrument itself."

From the face of the "premium account agreement" here being considered "no one can tell from the face of this paper what amount of money, if any, will become due under it. If one should at its execution attempt to stamp it, he could not tell what amount of stamps should be affixed" to it. (See *Lee v. Kenan*, supra.) From the face of the said agreement, money may or may not become due under it. If it becomes due no one can, at this time, tell how much or when it will be due. It is but an executory agreement to make loans of money, if desired, on the conditions mentioned (see *Metropolis Pub. Co. v. Lee*, supra). The said premium account agreement has the appearance of a commercial convenience, requiring the finance company to advance funds to the policy holder, or to the insurance agent to be loaned to the policy holders, as and when called for and in amounts needed to finance the premium payments due or to become due. Until

such funds have been advanced for such purposes, or until the amount required therefor has been ascertained, there is no base upon which the tax due or to become due may be calculated and determined. Should we deem the premium account agreements to be written obligations to pay money, within the purview of said §201.08, F. S., but not until the amount or amounts thereof has been ascertained and determined, we have no base for calculating and ascertaining the documentary stamp taxes due and payable. Generally the documentary stamp taxes are determined by present obligations to pay money not future advances raising an obligation to pay money.

However, written obligations to pay money "in connection with sales made under retail charge account services, incident to sales which are not conditional in character and which are not secured by mortgage or other pledge" of personal property seem to be taxable as to such charge accounts as and when entered (§201.08(2), F. S.). This reference may well be to the retail installment sales act, appearing as §§520.30-520.42, F. S., relating to the sale of personalty at retail by retail dealers as therein defined. These sections seem to relate to personal property "purchased primarily for personal, family or household use" etc. This would not seem to extend to moneys advanced as contemplated by the above question.

There appears to be some relation between the facts in this case and those in *Lee v. Kenan*, supra, and *Metropolis Pub. Co. v. Lee*, supra, in that no present fixed obligation to pay a sum of money seems to be involved. In *Lee v. Kenan*, the amount of the electricity to be furnished under the contract there involved was not capable of ascertainment when the contract was entered into; in *Metropolis Pub. Co. v. Lee*, the amount of the compensation to the printer could not be ascertained when the contract was entered into. Here the obligations to the finance company from the policy holders and the insurance agents are not capable of ascertainment at this time, there being no advances as of the date of the making of the premium account agreement. The tax is imposed by §201.08, F. S., on the actual amount of the indebtedness incurred under the agreement to pay money, not upon a mere estimate as to what may amount to.

From the above and foregoing, we conclude that "premium account agreements," and similar contracts, entered into by and between money lenders and holders of insurance policies, and with insurance agents, where the lenders obligate themselves to advance funds to such policy holders and insurance agents, to be used in the financing of insurance premium payments, are not subject to documentary stamp taxes, under §201.08, F. S., except to the extent that funds are advanced prior to or at the time of the execution of the premium account agreement or similar contract. "The liability of an instrument to stamp duty, as well as the amount of such duty, is determined by the form and face of the instrument, and cannot be affected by proof of facts outside of the instrument itself." (*U. S. v. Isham*, 84 U. S. 496, 21 L. ed. 728, text 730; *Metropolis Pub. Co. v. Lee*, 126 Fla. 107, 170 So. 442, text 444). Subsequent documents, if any, should be examined to determine their status, when read in the light of the premium account agreement, as written obligations to pay money.

063-39—April 12, 1963

PUBLIC MONEYS

STATE AND COUNTY DEPOSITORIES—SECURITY
REQUIRED—BONDS OF GEORGIA AUTHORITIES—

§§136.02(4), 18.10, 18.11, F. S.; §6, ART. IX, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are bonds issued by governmental authorities established by the statutes and laws of Georgia, within the purview of §136.02(4), F. S., and acceptable for deposit by state and county depositories under said subsection and section?

The securities required to be deposited by banks in this state desiring to qualify as county depositories, under §136.02(4), F. S., "shall consist of (a) bonds of the United States, (b) bonds the payment of whose principal and interest is guaranteed by the United States, (c) federal certificates of indebtedness, (d) bonds or certificates of the several states, (e) county and municipal bonds or certificates, (f) county or city school time warrants, issued by any of the counties or cities of the state, or by any of the state agencies, departments or commissions authorized to issue bonds or certificates, or issued by authorities created by the state legislature, and (g) bonds or other obligations issued by a housing authority pursuant to the housing authorities law of this state (Ch. 421), or issued by any public housing authority or agency in the U. S., when such bonds or other obligations are secured by a pledge of annual contributions to be paid by the U. S. government or any agency thereof. . . ." Bonds issued by governmental authorities established by the laws of Georgia would not be bonds or certificates within the purview of items numbered above as (a), (b), (c), (e), (f) and (g); this brings us to the issue of whether the bonds described in the above question are within the language of item numbered (d) above, that is "bonds or certificates of the several states, county and municipal bonds or certificates."

Counties, districts and municipalities in this state "shall have power to issue bonds only after the same have been approved by a majority of the votes cast in an election in which a majority of the freeholders who are qualified voters" shall participate. (§6, Art. IX, State Const.) The supreme court of Florida in numerous cases has used this constitutional provision to distinguish between "bonds" and other types of obligations under the laws of said state. Bonds have been held to be general obligations of the counties, districts and municipalities, other types of obligations, such as obligations to be paid from funds derived from other than general taxes. To be a bond the obligation must be payable from moneys raised by general taxation; if the obligation is payable from the income of a public utility, from the income of a public facility, otherwise than from general taxation, it is not deemed a general obligation under the laws of Florida. In *State v. Lee County, Fla.*, 121 So. 2d 788, the supreme court of this state held that tax anticipation certificates were not bonds within the purview of said §6, Art. IX, of the State Const.

This office in its opinion 043-307, of Nov. 5, 1943, (1943-1944 AGO 103) held that tax anticipation certificates issued by the state board of administration were not bonds within the purview of state and county depository statutes and laws and may not be used to secure deposits by state and county depositories. To the same effect see also opinion 043-291, of Nov. 1, 1943, (1943-1944 AGO 186) and

our opinion of Feb. 6, 1933, reported in 1933-1934 AGO 194. We have also held that certificates issued by the state board of control (1947-1948 AGO 629), air base certificates (1941-1942 AGO 10), Dade county causeway obligations (1941-1942 AGO 11) and Pensacola water revenue certificates (1935-1936 AGO 285) are not within the purview of §§18.10 and 18.11, F. S., and could not be used to secure county deposits of public funds. Bonds are usually held to be negotiable instruments, and one of the elements of a negotiable instrument is that it must "contain an unconditional promise to pay a sum certain in money." In *State v. City of St. Petersburg*, 117 Fla. 300, 157 So. 641, text 644, a so-called long-term interest bearing certificate, of the city of St. Petersburg, a bond because it "imported a general liability of the city," so as to be within the purview of §6, Art. IX, of the State Const.

The phrase "bonds or certificates of the several states, county and municipal bonds or certificates," used in §136.02(4), F. S., relates to general obligation bonds issued by states, counties and municipalities; and not to bonds and certificates which are not general obligations of the issuing state, county or municipality. They must have the pledge of the full faith and credit of the issuing state, county or municipality. We now come to the question of whether or not the bonds issued by the several governmental authorities of Georgia are general obligation bonds of the state itself. We have before us a copy of a ruling by James J. Saxon, comptroller of the currency of the U. S., under date of Oct. 16, 1962, wherein he concluded that bonds of said Georgia authorities were general obligation bonds within the meaning of paragraph (7) of §24, title 12 of the U. S. code. The said comptroller of the currency, in his said ruling, said that the said authorities have power to hold property in their own name, to borrow money for any of its corporate purposes, and to issue its negotiable revenue bonds payable solely earnings. "It does not have the power to levy taxes nor to pledge property other than its earnings. The state constitution authorizes the state, its institutions and political subdivisions to contract for the long-term use of the facilities of an authority and requires that appropriations be made sufficient to satisfy the payments required by such lease rental contracts. (Article VII, §6, paragraph I(a)). The general assembly, in §46 of the general appropriations act of 1961, has made the required appropriation for the current and future years and has provided that payment of lease rental contracts shall constitute a first charge on all such appropriations." These appropriations are made to the state authorities themselves and not to the holders of bonds issued by the said authorities. The state's obligation under said constitutional amendment is measured by its obligations to the authorities, not the authorities' obligations to their bondholders. The obligations of the several governmental authorities to their bondholders are not the measure of the state's authority to appropriate funds under subsection (a), paragraph I, §VI, Art. VII, of the Georgia Constitution; the state's obligation under §VI, Art. VII, above, is to the authorities and is measured by the state's contract obligations with said authorities.

Paragraph IV, §III, Art. VII, of the said Georgia constitution, provides that the "credit of the state shall not be pledged or loaned to any individual, company, association or corporation." The obligation of the state under said subsection (a), paragraph I, §VI, Art. VII, of the Georgia Constitution, legally is not a loan or lending of its credit to an individual, company, association or corporation, unconnected with the state, but the loaning or lending of the state's credit

to a governmental agency of the state. In case of the default of such governmental authorities on bonds issued by them, no proceeding against the state directly will lie, but proceedings authorized under said subsection (a), §VI, Art. VII, of the Georgia Constitution, must be followed.

We, therefore, conclude that the bonds issued by governmental authorities established by the statutes and laws of Georgia, *are not* within the purview of §136.02(4), F. S., and therefore *are not* acceptable for deposit by state and county depositories under said subsection and section; this because the said bonds are not the direct obligation of the state of Georgia. Such bonds are at most merely the indirect obligation of the said state, which obligation is not measured by the bond outstanding but by the obligations of the state and its agencies to the state authorities, which may or may not be equal to the bond obligation.

063-40—April 12, 1963

TAXATION

TANGIBLE PERSONAL PROPERTY TAXES—WHEN AND HOW ENFORCEABLE—HOUSE TRAILERS, ETC.—

§§200.27, 200.30, 200.45, 320.07, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

When and under what circumstances may an ad valorem tax against tangible personal property be enforced against the property taxed, or other property of the taxpayer, prior to April 1 next following the tax year for which assessed?

Under §200.27, F. S., "taxes on tangible personal property shall be deemed delinquent on the first day of April of the year following that for which the assessment was made." When such taxes are not paid on or before the said April 1, they become delinquent and subject to enforcement as provided in §200.27, F. S. However, we are here concerned with collections that may be made prior to said April 1 of the year following that for which the assessment was made.

Under §200.30, F. S., where tangible personal property subject to taxation in a county is being removed from the county where taxable, after it becomes liable for taxation, whether entered on the tax roll or not, it becomes immediately liable to the provisions of said section and may be proceeded against as is provided in said section. When the property has not left the county where assessed or liable for taxes, under conditions mentioned in said §200.30, it may be seized by the tax collector of the county; but where it has been removed from such county into another county of the state, the tax collector should issue his tax warrant for the seizure of the said property and deliver the same to the sheriff of the county wherein the property is found, or to the sheriff of his county to be transmitted to the proper sheriff. This section would seem to be applicable to automobile trailers not deemed to be motor vehicles under the Florida constitution and statutes.

Under §200.45, F. S., automobile trailers, in this state, not bearing a current Florida license tag thereupon (after Feb. 20 of the tax year as per §320.07, F. S.) are liable to tangible personal property taxes. Under said §200.45, the tax assessor, whenever he finds an automobile trailer located in his county to be without a motor vehicle tag after

Feb. 20 of the license year (or as extended by the governor, when extended) "he shall issue a certificate of valuation (for such automobile trailer) which shall be immediately conveyed to the tax collector of the county and the tax collector of such county shall collect the same within fifteen days from the date of such certificate of valuation, and if the same is not paid said automobile trailer is hereby made subject to levy and sale the same as any other delinquent personal property." Under said §200.45, it is further provided that "if such certificate is issued before November first the tax rate thereon shall be based upon the same as the previous year's rate," this seems to authorize a proceeding under said §200.45 prior to April 1 of the following tax year.

Said §200.45, F. S., seems to be in the nature of an exception from the usual taxing procedures of tangible personal property, substituting certificates of valuation by the assessor of taxes in lieu and in place of the usual tangible personal property tax roll. It would appear the legislature deemed the procedure under said §200.45 necessary because of the mobile capacity of automobile trailers and the ease in which they may be moved from county to county, or even from state to state.

It appears from the request for opinion herein that the assessor of taxes for Sarasota county instead of following the requirements of said §200.45, and making the certificate of valuation therein required, entered the automobile trailers in his county, without license tags thereon, upon the regular tangible personal property tax roll instead of issuing certificates of valuation thereon as required in and by said §200.45, F. S. We are of the view that the entries of the automobile trailers on the tangible property tax roll should be taken and deemed a certificate of valuation within the purview of said §200.45, and that the tax collector should follow the provisions thereof when collecting such tax assessments.

063-41—April 12, 1963

CITIES AND TOWNS

MUNICIPAL FUNDS—INVESTMENT IN FEDERAL AND LOAN ASSOCIATIONS—§§665.43, 167.74, 18.10, 18.11 AND 18.111, CHS. 18, 136, AND 665, F. S.

To: Willard D. Dover, City Attorney, Fort Lauderdale

QUESTIONS:

1. May a municipality in this state invest its idle funds in federally-chartered savings and loan associations?
2. May a municipality permit its municipal officers, other than the municipal treasurer, to make investments of municipal funds in a federally-chartered savings and loan association?
3. May a municipality, through its proper officer, invest moneys in a federally-chartered savings and loan association in more than one account, in each of which the city treasurer, or other proper municipal officer, is designated as trustee of said municipality?

These questions relate to federal savings and loan associations, organized and established under §§1461-1468, title 12, U. S. code, and not to building and loan associations organized and established under Ch. 665, F. S. It is provided by §1464, title 12, U. S. code, that "in order

to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the federal home loan bank board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination and regulation of associations to be known as 'Federal Savings and Loan Associations,' and to issue charters therefor." In said §1464, title 12, U. S. code, it is further provided that "such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as therein provided. *No deposits shall be accepted*, and no certificates of indebtedness shall be issued *except for such borrowed money* as may be authorized by regulations of the Board." (Emphasis supplied.)

Duly adopted regulations of the federal home loan bank board define several terms used in connection with the federal savings and loan system, including definitions of *savings account*, *capital*, *withdrawal value*; a *savings account* being defined as meaning "the monetary interest of the holder thereof in the capital of a federal association and consists of the withdrawal value of such interest," *capital* as meaning "the aggregate of the payments on savings accounts in a federal association, plus earnings credited thereto, less lawful deductions therefrom," and *withdrawal value* being defined as "the amount paid on a savings account in a Federal association, plus earnings credited thereto, less lawful deductions therefrom." The above reference to a federal association is in fact to a federal savings and loan association.

The U. S. court of appeals for Dist. of Columbia, in *Aetna Cas. and Surety Co. v. Porter*, 296 Fed. 2d 389, text 391, and in *Wisconsin Bankers Ass'n v. Robertson*, 294 Fed. 2d 714, text 716, held a "share" in a federal savings and loan association to be an *investment*, and not a *deposit*, in the sense of a *deposit of money in a bank*. In the Wisconsin banker's association case the court said that "of necessity, then, the capital of a federal savings and loan association may only be raised through payments into so called savings accounts plus earnings thereon. By placing funds in a savings account, the depositor contributes capital to the savings and loan association. In exchange, he acquires a share interest in the capital of an association equivalent to the withdrawal value of his interest. The legal relationship resulting from the creation of this interest is not, however, that of debtor and creditor. . . . It is obvious, then, that this relationship is legally distinct from that existing between a bank and its depositor in which the latter is, to the amount of the deposit, a creditor of the former."

In *Aetna Cas. and Surety Co. v. Porter*, CCA D. C., 296 Fed. 2d 389, the court treated investments by the committee of an incompetent war veteran as having the nature of a permanent investment, subject to the claim of creditors; however, the U. S. supreme court, in *Porter v. Aetna Cas. and Surety Co.*, 370 U. S. 159, 82 S. Ct. _____, 8 L. ed 2d 407, because of its ready availability for use by the committee for the support of the veteran, and his status as a shareholder and not a creditor, held the account not subject to claims of creditors. This case may make a distinction between a permanent investment and a temporary one. Mr. Justice Douglas, in his separate opinion, remarked that "the Home Owners' Loan Act, under which federal associations are created, makes clear that its purpose is 'to provide local mutual thrift institutions in which people may invest their funds.'"

Formerly, prior to around 1949, the rules and regulations of the federal home loan bank board used the term "share account" for which the amended regulations substituted the term "savings account"; the

term "withdrawal" was substituted for the term "repurchase"; and the term "earnings" for the term "dividends." In *Wisconsin Bankers' Ass'n v. Robertson*, 190 Fed. Supp. 90, and 294 Fed. 2d 714, the bankers' association objected to the making of the above changes in said terms by the bank board, primarily on the ground that the use of the term "savings account" in lieu of "share account" permitted the taking of deposits by the savings and loan associations. This the court rejected, evidently feeling that the definition of the term "savings account" in the board's regulations was controlling. The contention of the bankers' association that the "term 'savings account' has come to be restricted in its meaning to such an account in a bank, and may not be used as having any other significance," was rejected by the court and the board's definition upheld.

An examination of §§1724-1730, title 12, the U. S. code, clearly reveals that statutes relating to the insurance of savings and loan accounts clearly contemplates accounts of individuals, partnerships, associations, corporations, officers, employees and agents of the U. S. and of any state, of any city or county, and political subdivisions, of the states, involving public funds, are included in such insurance. See definition of "insured member" in §1724(b), title 12, U. S. code.

From the above and foregoing it appears that under the federal statutes providing for federal savings and loan associations and the federal savings and loan insurance corporation, that the investment of state, county, municipal and district funds in share accounts of the federal savings and loan associations are clearly contemplated and provided for. We come next to the question of the Florida Statutes and laws in the same connection and whether or not such laws authorize and permit the investment of municipal funds in share accounts of federal savings and loan associations. In this connection see §665.43, F. S., providing that:

Any and all officials by whatever name known of any city, town or municipality in the state whether created under the general or special act or acts, having the custody, control, supervision, management, or authority to invest any fund or funds of any such city, town or municipality, is hereby authorized and empowered to invest said fund or funds in investment share accounts of any federal savings and loan association chartered under the laws of the United States, and doing business in the state, and in the shares of any Florida building and loan association, which is a member of the federal home loan bank system. (Emphasis supplied.)

This section in permitting the investment of municipal funds in share accounts of federal savings and loan associations contemplates an authority in the municipality to invest any fund or funds. Under §167.74, F. S., "the governing board or body of any municipality in this state is hereby authorized and empowered, by resolution, in its discretion, to provide for the investment of any surplus municipal funds in its control or possession," in the securities therein mentioned. This statute doubtless is declaratory of the general law on the question. The statutes of this state generally require that where current funds are deposited in public depositories of money that such depositories furnish some type of security to insure the safety of such deposits. The statutes and laws of this state seem to draw a distinction between the deposit of public moneys and the investment of such moneys. Sections 167.74 and 665.43, F. S., as well as other statutes and laws, relate to the investment of public funds and not to the deposit thereof in depositories.

In *McCrary Stores Corp. v. Tunncliffe*, 104 Fla. 683, 140 So. 806,

text 807, the court said that "the term 'deposit' when used in connection with a banking transaction, denotes a contractual relation between one who delivers money or a thing to a bank which receives it with the implied agreement on the part of the bank that the deposit will be paid out on the order of the depositor or returned to him on demand." The courts, in *Brooke v. White*, 219 Iowa 624, 258 N. W. 766, text 767; *Fay v. Fay*, 172 Md. 570, 193 A. 674; and *State v. McFetridge*, 84 Wis. 473, 54 N. W. 1, 20 L. R. A. 223, recognized a distinction between a "deposit" and an "investment." In *Fay v. Fay*, supra, the court said that "there is a distinction between a *deposit*, which ordinarily is a mere incident of custody, and an *investment*, which involves converting the assets of the estate into a different form." In *State v. McFetridge*, supra, the court held a deposit of moneys in a bank *not to be* an investment, but a deposit. In *Brooks v. White*, supra, the court said that the controlling consideration in determining if funds deposited in a bank are a "deposit" rather than an "investment" is whether the depositor has an absolute right to withdraw such funds on demand, and not whether such funds are not to draw interest. See also cases cited in 12 Words and Phrases 237, distinguishing investments from deposits. Section 665.43, F. S., relates to investments, and not to deposits, of public municipal funds.

In the light of §§18.10, 18.11, 18.111, and other provisions in Ch. 18, and Ch. 136, F. S., as well as other legislative requirements for security in connection with the administration of public funds, doubtless the legislature was influenced by the fact that investments made under said §665.43 would have the security of the insurance of savings and loan accounts under §§1724, et seq., title 12, U. S. code. This leads us to feel that no investments should be made under said §665.43, F. S., unless secured by such insurance to the full amount of the investment, or by other legal and sufficient security satisfactory to the investing municipality. We here express no view on the legal authority of a federal savings and loan association to pledge its property to secure such investments.

These observations lead to an affirmative answer to question 1, when the above mentioned requirements are complied with.

We are inclined to the view that §167.74, F. S., providing that the "governing board or body of any municipality in this state is hereby authorized and empowered, by resolution, in its discretion, to provide for the investment of any surplus municipal funds in its control and possession in" the securities therein mentioned is applicable here. When §665.43, F. S., is read in the light of said §167.74, we feel that investments under said §665.43, should be made under the authority of the governing board or body of the investing municipality.

We are, therefore, of the opinion that a municipality may permit its municipal officers, other than the municipal treasurer, to make investments of municipal funds in a federally-chartered savings and loan association, provided the governing board or body of the municipality so provides; provided, however, such procedure is not prohibited by charter provision. This answers question 2.

Under the information available to us it appears that a municipality may, through its proper officer, invest moneys in a federally-chartered savings and loan association in more than one account, in each of which the city treasurer, or other proper municipal officer, is designated as trustee for said municipality; however, you should obtain assurance from the savings and loan association wherein the investment is made that such investment is duly secured by federal savings and loan association insurance.

063-42—April 15, 1963

STATE AND COUNTY OFFICERS AND EMPLOYEES

RETIREMENT SYSTEM—EFFECT, IF ANY, ON RETIRED
STATE OR COUNTY EMPLOYEE SERVING AS
EXAMINING COMMITTEEMAN UNDER
§394.22, F. S.—CH. 122, §122.16, FOR-
MER §§121.14 AND 134.14, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May a state or county employee, after having retired under and pursuant to Ch. 122, F. S., serve as an examining committeeman, and receive compensation therefor without violating §122.16, F. S.?

Section 122.16, F. S., provides in part that "any person who has accepted and is receiving retirement compensation under this chapter (i.e., Ch. 122, F. S.) shall have such compensation suspended during any period of reemployment in any capacity whatsoever by the state or any political subdivision, or any department, branch or agency thereof. Any person receiving retirement compensation under this chapter who becomes reemployed by the state or any political subdivision, department, branch, or agency thereof shall furnish timely notice in writing by which he is becoming employed, and to the comptroller of the fact that he is prohibited from receiving retirement compensation and salary at the same time and should he fail to do so, and should he receive and retain both benefits and compensation, he shall forfeit all the benefits of this chapter."

Former §121.14, F. S., relating to state officers and employees retirement provided that "any person accepting or enjoying the benefits of retirement compensation under this chapter who accepts employment or received any compensation from the State of Florida, or any county of the State of Florida, or any political subdivision, branch or agency thereof for services rendered shall forfeit all benefits of this chapter forever. . . ." Former §134.14, F. S., contained a like provision, however, said section was amended by §2, Ch. 28258, 1953, so as to read substantially the same as present §122.16, F. S. Sections 121.14 and 134.14, F. S., appear to have been the basis of said present §122.16, F. S. Under these sections a retired employee who was not only reemployed while receiving retirement compensation, but also such retired persons "*receiving any compensation from the State of Florida or any subdivision, branch, or agency thereof for services rendered*" (Emphasis supplied.) forfeited his retirement compensation.

The italicized language found in said prior §§121.14 and 134.14, F. S., appears to have been omitted from present §122.16, F. S. The present ground for forfeiting retirement compensation, as provided in said §122.16, F. S., is "*reemployment in any capacity whatsoever by the state or any political subdivision, or any department, branch or agency thereof.*" (Emphasis supplied.)

The present grounds for forfeiting retirement pay being "reemployment in any capacity whatsoever by the State of Florida, or any subdivision, branch or agency thereof," our issue for determination becomes whether or not a committeeman, appointed by a county judge under and pursuant to §394.22(6), F. S., is employed by the state within the purview of said §122.16, F. S. Under said §394.22(6), the "judge shall appoint an examining committee consisting of a responsible citi-

zen of this state and two practicing physicians." We gather from said §394.22, F. S., that such appointments are made in each separate case, and not for a fixed time as examiners for all persons coming before the court under said §394.22. This appointment of committeemen in some ways resembles court jurors, who we doubt could be classified as state or county officers or employees.

The term "state and county officers or employees," as used in Ch. 122, F. S., is defined as "including all fulltime officers or employees who receive compensation for services rendered from state or county funds." Such examining committeemen appointed under said §394.22, F. S., if appointed for each individual case, could not be classified as an officer or employee under said §122.16, F. S. We do not think that a person summoned as a juror by any of the courts of this state would be deemed a state or county employee within the purview of said §122.16.

The above question is answered in the affirmative, when appointed in each separate case, and there is no agreement or understanding between such retiree and the court or its officers that he will be appointed or permitted to serve in a large number of cases coming before the court.

063-43—April 29, 1963

TAXATION

UNDIVIDED FEE INTERESTS IN REAL PROPERTY— ASSESSMENT AND REDEMPTION OF TAXES THEREON—§§194.02, 194.13, 193.20, 192.21, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Where a parcel of real property, owned and held by two or more owners as tenants in common, is assessed as one assessment against said tenants, may one or more of such tenants, less than all, redeem such assessment as to his undivided interest without paying the assessment in full?

2. Where a parcel of real property is owned and held by two or more persons as tenants in common, may the respective interests of such tenants be separately assessed on the county tax roll?

Section 194.02, F. S., provides in part that "any person, or agent of any person, owning or claiming such lands sold for taxes, or any part or parcel thereof, or *any interest therein*, or the creditor of any such owner or claimant may redeem the same at any time after such sale and before a tax deed is issued therefor, by paying to the clerk of the circuit court of the county wherein such land is situated the face of the certificate of sale, or *such portion thereof as the part or interest redeemed shall bear to the whole*, and interest thereon from the date of the certificate, together with the fee of fifty cents for the clerk for each certificate or part of certificate so redeemed." Section 194.13, F. S., made applicable to state held tax sale certificates and to privately held tax sale certificates, provides that "any portion of land, or *interest therein contained*, in a tax sale certificate or certificates held by the state may be redeemed by a certificate of such transfer or redemption, under the hand and official seal of the clerk of the circuit court, upon such clerk being furnished by the county assessor of taxes with a cer-

tificate apportioning the value to the part or parts sought to be redeemed, and to the remaining land or lands under said certificate or certificates, according to their respective part or parts, said apportionment to be made upon the basis of valuation. . . . Any portion of land, or interest therein contained, in a tax sale certificate or certificates held by any person other than the state, may be redeemed by the person entitled to redeem the same by a certificate of such redemption under the hand and official seal of the clerk of the circuit court, upon such clerk being furnished by the county assessor of taxes with a certificate apportioning the value to the part or parts sought to be redeemed and to the remaining land under said certificate or certificates, according to their respective part or parts, said apportionment to be made upon the basis of valuation. . . ." (Emphasis supplied.)

In 85 C. J. S. 850 and 851, §850, it is stated that "the owner of an undivided interest in land, where a statute permits, may redeem the entire property, or his undivided interest in the property, from a tax sale. It has been held that the holders of an undivided interest in the oil, gas, and minerals in and under certain land have a right to redeem. Where a statute provides that in order to effect a redemption the entire amount due must be paid, the person seeking to redeem must pay such amount, even though he possesses only an undivided interest in the property; *but some statutes give the owner of an undivided interest a right to redeem his interest on payment of a proportionate share of the entire amount due.* Where a statute allows redemption of land by anyone having a 'legal claim therein,' one who owned an undivided interest is within the statute. The holder of a quitclaim deed from the owner of an undivided interest may redeem under a statute giving that right to a 'party in interest.'" (Emphasis supplied.)

In *State v. Hunter*, 103 Fla. 1097, 139 So. 138, text 140, the court remarked that "all we are called upon to determine here is whether or not this realtor may, under the terms of the statute, redeem a portion of the lands embraced in a tax certificate without redeeming the remainder, and we think that such right exists too clearly to be questioned." In *Green Cove Farms v. Ivey*, 119 Fla. 561, 161 So. 56, text 57, the court recognized the right of the clerk of the circuit court to sell and transfer a part of a tax sale certificate. See also *State v. Hunter*, 103 Fla. 1097, 139 So. 138; *State v. Butts*, 111 Fla. 630, 149 So. 746; and *State v. Culbreath*, 118 Fla. 6, 160 So. 3, where the right to partial redemption was recognized; however, in the latter case, as well as in the *Green Cove Farms v. Ivey* case, *supra*, it was held that partial redemption should not be allowed where the property is such as will not admit of division.

Generally, the terms "real property" and "real estate" embrace lands, tenements and hereditaments, and all rights thereto and interests therein; such terms have also been held to include any estate or interest or right in realty or land, generally the terms import an estate of freehold including absolute or entire fees, fee simple titles, life estates and estates in remainder. (73 C. J. S. 157-170, §7). A tenancy in common is the holding of property by several persons by several and distinct titles, there being unity of possession only. (86 C. J. S. 361, §§1 and 2). Tenancies in common may be created by purchase and conveyance (86 C. J. S. 367, §8) or by descent or devise (86 C. J. S. 372, §9). "Tenants in common hold by several and distinct titles, with unity of possession. In other words, no privity of estate exists between them, but as between themselves their rights and interests are several; there is no unity of title between them, each owner being considered solely and severally seized of his share." (86 C. J. S. 362, §4). A tenant in

common may, without the consent of his cotenants, convey or dispose of his undivided interest in the common property so long as he does not prejudice the rights of his cotenants in the premises. (86 C. J. S. 531, §120).

Although §§194.02 and 194.13, F. S., make provision for the redemption of "lands sold for taxes, or any part or parcel thereof, or interest therein" from the tax sale certificate or certificates evidencing such taxes, we find no statute or law of this state for the separate assessment of separate interests in a parcel of real property. In 84 C. J. S. 774, §404, it is stated that "real property belonging to several persons as joint tenants or tenants in common should be assessed to them jointly, giving the names of all," except where otherwise provided by statute. See also 51 Am. Jur. 643 and 644, §§689 and 690; 3 Cooley on Taxation, 4th Ed., 2235, §1104; Ann. in Ann. Cas. 1914A, pp. 568 and 569; 50 L. R. A. (NS), pp. 402-404 and 407-411; and 80 A. L. R. 862-865. It, therefore, appears that the separate assessment of undivided interests in the same parcel of real property is not directly provided for by the statutes and laws of this state. Under §193.20, F. S., when a parcel of land "is returned by more than one person the county assessor of taxes shall write the names of all claimants opposite said description of land."

Prior to the effective date of Ch. 10040, 1925, the separate assessments of several undivided interests in real property would probably have been an invalid assessment. Said Ch. 10040, 1925, together with amendments and extensions now appears as §192.21, F. S. Under said §192.21 "all provisions of law now existing or which may be hereafter enacted relating to the assessment and collection of revenue (unless otherwise specifically so declared) shall be deemed and held to be directory only, designed for the orderly arrangement of records and procedure of officers in enforcing the revenue laws of the state." It is also provided in said section that "no act of omission or commission on the part of any tax assessor, or any assistant tax assessor, or any tax collector, . . . shall operate to defeat the payment of said taxes; but any such acts of omission or commission may be corrected at any time." It is further provided in and by said section that "no sale or conveyance of real or personal property for nonpayment of taxes shall be held invalid except upon the proof that the property was not subject to taxation, or that the taxes had been paid prior to the sale, or that the property had been redeemed. . . ." Should undivided interests in a parcel of real property be separately assessed such an assessment would not be invalid, although not made in accordance with statutory and common law requirements, and may be enforced.

From the above and foregoing statutes, authorities and observations we conclude that:

1. Where a parcel of real property, owned and held by two or more owners as tenants in common or in joint tenancy, is assessed as one assessment against said tenants, less than all may, under the statutes and laws of this state, redeem such assessment as to their individual interests without paying the assessment in full. In such cases it becomes the duty of the tax assessor to determine and fix the assessed value of each said undivided interest. When such an undivided interest is so redeemed the tax obligation will continue as to the interests not so redeemed. Should a tax sale certificate be issued after such redemption the certificate should be issued as incumbering the remaining undivided interests; if issued before redemption a notation should be made on the tax sale certificate evidencing such redemption.

2. Under normal circumstances where a parcel of real property

is owned and held by two or more persons as tenants in common, such property should be assessed as a unit naming all such tenants as owners; however, the tax assessor, where circumstances may demand, may assess such undivided interests or any of them separately.

3. Under the rule above mentioned should a cotenant be entitled to tax exemption his interest may be separately assessed and his exemption as to his interest allowed.

063-44—May 1, 1963

TAXATION

INTANGIBLE PERSONAL PROPERTY TAXES—RENEWAL OF NOTE AND NEW ADVANCE—§§199.02, 192.03, 199.11, 201.08, 201.09, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What amount of intangible personal property taxes are due and payable upon a promissory note in the principal sum of \$80,000 given to evidence the renewal or extension of a balance due on an existing note of \$25,007.43 and a new loan or advance of \$54,992.57, said \$80,000 note being secured by a mortgage lien encumbering real property in this state?

The said balance of \$25,007.43 is the unpaid balance of a proper obligation evidenced by a promissory note, by and between the same parties, which was also secured by a mortgage encumbering the same real estate as is encumbered by the said mortgage given to secure the payment of the above mentioned \$80,000 note and obligation. Section 199.02(3), F. S., defines class "C" intangible personal property as "being all notes, bonds and other obligations bearing date subsequent to December 31, 1941, for the payment of moneys which are secured by mortgage, deed of trust, or other lien upon real property situated in Florida. . . ." Section 199.11, F. S., imposes an intangible personal property tax "on all class 'C' intangible personal property (of) two mills on the dollar of the taxable value of such class 'C' intangible personal property, which taxable value shall be the *principal amount of the indebtedness* evidenced by such obligation, which tax shall be due and payable when the mortgage, deed of trust, or other lien is executed and shall be paid to the county tax collector before the mortgage, deed of trust or other lien securing such indebtedness is presented for recordation. . . ." (Emphasis supplied.)

In 10 C. J. S. 413, §7, a promissory note, or note, is defined as "a written promise to pay another a certain sum of money at a certain time." In said 10 C. J. S. 1155, §526, it is stated that "where a negotiable instrument, such as a note or check, was given as evidence of, or security for, a debt, and not as absolute payment thereof, the payee may, on nonpayment at maturity, sue on the original consideration, provided he produces and surrenders, or offers to surrender the instrument, or presents an adequate excuse for its nonproduction." In other words, the payee of the note has the option of suing either on the instrument or on the original obligation. In *Lee v. Quincy State Bank*, 127 Fla. 765, 173 So. 909, text 910, the court remarked that "a renewal note involves a new contract by the maker or obligor." It is evident from this case that, except for §201.09, F. S., that renewal notes would be liable for documentary stamp taxes under §201.08, F. S. Certificates

of indebtedness (bonds and debentures) issued by a corporation are subjected to a documentary stamp tax under §§4311-4316, title 26, U. S. code, §4313 thereof providing that "every renewal of a certificate of indebtedness shall be taxed as a new issue." "A renewal, as distinguished from a mere extension, is usually evidenced by a new note or other instrument." (10 C. J. S. 758, §263). "The execution of a note in renewal of a previous one is not a payment of such prior note, nor the creation of a new indebtedness, unless there is an express agreement to that effect by the parties." (Board of Pub. Instr. v. State, 145 Fla. 482, 199 So. 760, text 761).

From the above and foregoing it appears that the making, execution and delivery of a renewal or substitute promissory note for an obligation of the maker, or for an existing note held by payee and made by the maker, although a new contract between the parties, except where otherwise agreed, will not be deemed a satisfaction of the obligation or prior note due and owing from the maker to the payee. This being true the holder of the latter note or obligation may elect to enforce the latter note, or the prior obligation or note. Such a note or renewal note is note, bond or obligation within the purview of §199.02(3), F. S., and may be sued on as a written obligation of the maker, although the holder thereof has the election of waiving such renewal note and suing on the original note or obligation.

Under the circumstances presumed in the above stated question, the above mentioned promissory note is taxable at its full cash value, notwithstanding it represents or evidences a previous note or obligation. The taxable value of the \$80,000 promissory note is not reduced by reason of the fact that it represents in part a renewal of the existing \$25,007.43 note or obligation existing at the time of the execution and delivery of the said \$80,000 promissory note. Intangible personal property taxes should be calculated and imposed on the basis of the full cash value of the \$80,000 note, with no reduction for the existing \$25,007.43 existing at the time of its execution and which was included therein. When determining the taxable value of a promissory note held by a taxpayer the solvency of the maker or obligor must be taken into consideration (see §192.03, F. S.).

063-45—May 2, 1963

TAXATION

TAX STATUS OF REAL AND PERSONAL PROPERTY OWNED BY FOREIGN NATIONS IN FLORIDA

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is the real and personal property of a foreign nation in this state and held and used by it as a home and office of its consul in this state subject to ad valorem taxes by the county wherein such property is located?

Taylor, in his work on International Public Law, 1901, at p. 345, §315, states that "the rule observed by this government with respect to taxation of property owned by a foreign government and occupied as its legation, is to accord reciprocity in regard to general taxation, but not to specially exempt it from local assessments, such as water, rent and the like, unless it were definitely understood that these taxes could also be exempted by the foreign government upon a piece of property belonging to the United States, and used for a like purpose by our

minister." This statement appears to have been based on a letter written by the secretary of state of the U. S. to a "Mr. Wooley," on April 15, 1886. This view is supported by 5 Moore, International Law, 669-673, §667; 4 Hackworth, Digest of International Law, 707; Wheaton's International Law, 5th Ed., 347; Fenwick, International Law, 2nd Ed., 375; 26 Am. Journal of International Law (1932), pp. 114 and 115. The matter seems to be largely a question of international law and reciprocity.

In the light of the above and foregoing, *the real and personal property of a foreign nation in this state held and used by it as a home and office of its consul in this state is entitled to exemption from ad valorem taxes in this state, only when the said foreign nation owning such property accords to the United States a like exemption for properties of the United States in such country owned and used by the United States for a like purpose.* This is in the nature of a fact to be determined by the county assessor of taxes. A certificate from the state department of the foreign nation owning and using such property in this state should be accepted by the county assessor of taxes as sufficient proof of the exemption of like U. S. properties therein.

063-46—May 9, 1963

LEGISLATURE

EFFECT OF EXTENSION OF REGULAR SESSION ON TIME FOR CONSIDERATION OF BILLS IN GOVERNOR'S OFFICE AT END OF REGULAR SESSION—§2, 28, ART. III, §18, ART. IV, STATE CONST.

To: L. K. Edwards, Jr., Chairman, Senate Committee
on Appropriations, Tallahassee

QUESTION:

Should the general appropriations bill be duly passed and presented to the governor after the 55th day of a regular session, what period of time does the governor have to take action thereon, when such regular session is extended under §2, Art. III, State Const.?

Under §28, Art. III, State Const., "every bill that may have passed the legislature shall, before becoming a law, be presented to the Governor; if he approves it he shall sign it, but if not he shall return it with his objections to the house in which it originated. . . . If any bill shall not be returned within five days after it shall have been presented to the Governor (Sunday excepted) the same shall be a law in like manner as if he had signed it. If the legislature, by its final adjournment prevent such action, such bill shall be a law, unless the Governor within twenty days after adjournment, shall file such bill, with his objections thereto, in the office of the Secretary of State. . . ." (Emphasis supplied.)

Section 18, Art. IV, State Const., provides that "the Governor shall have power to disapprove of any item or items of any bills making appropriations of money embracing distinct items, and the part or parts of the bill approved shall be the law, and the item or items of appropriation disapproved shall be void, unless repassed according to the rules and limitations prescribed for the passage of other bills over the executive veto."

Section 2, Art. III, State Const., provides in part that "the regular sixty day biennial session of the legislature may, by a three-fifths vote

of the membership of both houses, be *extended* a total of thirty days which need not be consecutive. Recesses in such *extended session* shall be taken only by joint action of both houses. No *extended session* may last beyond September first following the regular biennial session. During such *extended session*, no additional proposed legislation shall be introduced unless consent is first obtained by a two-thirds vote of the members of the house into which it is sought to be introduced." (Emphasis supplied.)

From the above and foregoing it appears that the governor is given five days during the sessions of the legislature within which to veto bills and items in the general appropriations act; however, this limitation is subject to the further provision, in §28, Art. III, that "if the legislature, *by its final adjournment* prevent such action," the governor's right to veto such bills and items in general appropriations acts, his time for such vetoes is extended to a period of within 20 days after the sine die adjournment of the legislature. A reading of said §28, Art. III, reveals that for the governor to have said 20 days within which to take action on the bills presented to him, the legislature must "*by its final adjournment* prevent such action" (emphasis supplied) within the five-day period. This brings us to the question of whether or not the action of a three-fifths vote of the membership of both houses *extending* the regular session for not exceeding 30 days is in law a sine die adjournment of the regular session and the beginning of another session not to exceed 30 days. In §2, Art. III, we have language providing that a regular session of the legislature may be "extended" and three references to an "extended session."

The term "extended" is defined in Black's Law Dictionary as "a lengthening out of time previously fixed and not the arbitrary setting of a new date. . . . Stretched, spread or drawn out." It is stated in 35 C. J. S. 346, that "it has been said that the most common usage of the word 'extended,' especially in legal connotation, is along the line of its derivation, to stretch out. The term is defined as meaning stretched; spread or drawn out; prolonged." "To 'extend' means to stretch out or to draw out or to enlarge a thing." (State v. Zazzaro, 128 Conn. 160, 20 A. 2d 737, text 742; Missouri K & T. R. Co. v. Texas & N. O. R. Co., 172 F. 2d 768, text 769; State v. Armstrong, 31 N. M. 220, 243 P. 333, text 345; Crane Enamelware Co. v. Smith, 168 Tenn. 203, 76 S. W. 2d 644; Rosville State Bank v. Heslet, 84 Kan. 315, 113 P. 1052).

From the above and foregoing authorities it seems evident that the provision in §2, Art. III, State Const., authorizing an *extension* of a regular session of the legislature for a period of not to exceed 30 days, means and refers to the enlargement or extension of the regular session, not to the holding of a separate and additional session of the legislature after the ending of the regular term. When the legislative session is extended as provided in §2, Art. III, State Const., such an extension is a continuation of the regular session, and not the holding of another session of the legislature beginning at the end of the original 60-day period of time. This conclusion is supported by the fact that during the extended session pending legislation is carried forward, without the necessity of reintroduction, as continuing items of business. Only new legislation is required to be introduced, provided consent is given by a two-thirds vote of the members of the house in which it is sought to be introduced. Logically, it follows that pending items of legislative business arising in the regular session, including vetoed bills, retain the same status in the extended session they attained in the 60-day period. Otherwise the clear intent of a continued session would be defeated and confusion would arise in trying to treat the extended ses-

sion as a special or extraordinary special session called by the governor.

Therefore, should the general appropriations bill be duly passed and presented to the governor after the 55th day of a regular session, and such regular session be extended in the manner provided in and by §2, Art. III, there will be no adjournment of the regular session and the beginning of a separate and distinct session. Therefore, the 5-day limitation will be applicable so that should the governor take no action within a period of 5 days the bill and every item will become a law, unless there is an adjournment sine die within said 5-day period.

063-47—May 6, 1963

TAXATION

HOMESTEAD TAX EXEMPTION—CLAIM BY UNMARRIED MINOR—WITH LIVING PARENT CLAIMING EXEMPTION OF SEPARATE PROPERTY—§7, ART. X, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May homestead tax exemption be granted an unmarried minor, whose disabilities have not been legally removed, residing on real property owned by him, when his parents or the survivor thereof maintain a homestead in the state upon which homestead tax exemption is claimed and allowed?

The unmarried minor in question is said to be 19 years of age, who has not been married or had his disabilities of nonage legally removed. The property claimed to be tax exempt was heretofore legally vested in the said minor by a deed of conveyance and is unencumbered. For the purposes of this opinion we will presume that if the minor in question was of age and had made the property in question his permanent home, within the purview and intention of §7, Art. X, State Const., that he would be entitled to tax exemption for said property.

Said §7, Art. X, State Const., provides, in so far as here material, that "every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home . . . shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of five thousand dollars. . . ." The reference to "every person who has the legal title or beneficial title in equity" in said §7 of said Art. X, State Const., may well include a minor holding such a title to real property. However, an unmarried minor, whose disabilities of nonage have not been removed, may maintain a *permanent home* upon the said property so long as his parents or either of them are alive, until his disabilities of nonage have been removed by becoming of age, marriage or otherwise.

In *Beekman v. Beekman*, 53 Fla. 858, 43 So. 923, text 924, the court held that "under the laws of Florida the domicile of the father is the domicile of his minor children, and such minors are incapable in Florida of making choice of a domicile here independently of the domicile of their father, and such a disability continues here with all minors, be they male or female, until they arrive at the age of twenty-one years," unless their disabilities of nonage be removed by marriage or otherwise prior to marriage. This rule has been followed in *Chisholm v. Chisholm*, 98 Fla. 1196, 125 So. 694, text 702; *Bourn v. Hinsey*, 134 Fla. 404, 183 So. 614, text 615 and 617; *Meehan v. Meehan*, Fla. App.,

133 So. 2d 776, text 778. See also 28 C. J. S. 21, et seq., §12; 17A Am. Jur. 245, §66.

The above stated question, in the light of the foregoing authorities, is answered in the negative, the unmarried minor being unable to establish a domicile separate and apart from that of his father, or mother in case of the death or other legal disability of the father or surviving parent.

063-49—May 13, 1963

GAMBLING

RADIO STATION CONTEST—PRIZES AWARDED OWNERS OF DOLLAR BILLS HAVING SERIAL NUMBERS BROADCASTED—LOTTERY

To: *Don Genung, Sheriff, Pinellas County Courthouse, Clearwater*
QUESTION:

Is the contest described below, planned by a local radio station, a violation of the state lottery laws?

STATEMENT OF FACTS:

The station proposes to broadcast serial numbers on dollar bills already in circulation. Any person having one of the bills will bring it to the radio station and exchange it for a cash prize. The winning numbers will also be posted in local merchant's stores, but the winner must come to the radio station to receive the cash prize.

As you know, the three vital elements of a lottery, all of which must be present, are (1) a prize, (2) an award by chance and (3) consideration. See the case of *Little River Theatre Corp. v. State ex rel Hodge*, 135 Fla. 854, 185 So. 855.

In my view, it is readily apparent that a prize or prizes are to be awarded. I think you would agree that the winners of the prize or prizes are to be determined purely on chance.

Viewing the circumstances of the scheme outlined above, and assuming that it would be implemented in precisely that manner, I fail to find the necessary third element of consideration. I so conclude because the potential winners are already possessed of the dollar bills, the serial numbers of which are ultimately to be checked against those selected as the winners. This being so, no consideration is required of them until after they have determined that their dollar bill is in fact a winner.

Since any consideration only comes into existence after their status as winners has been established by the simple fact of corresponding numbers, I do not consider that it plays any part in implementing the scheme. I therefore conclude that the promotional scheme set out above, if implemented as stated, would not constitute a violation of the lottery laws of our state.

063-50—May 20, 1963

TAXATION

EFFECT UPON OWNERSHIP AND TAXABILITY OF LANDS— AFFECTED BY ACCRETION, EROSION OR AVULSION

To: *Robert T. Carlile, City Attorney, Deerfield Beach*

QUESTIONS:

1. Should taxes be levied on lots completely submerged at high tide but not at low tide and on lots completely submerged at low tide? I take the position that they should not be taxed and that, even though property owners demand tax bills, these tax bills should not be rendered. Do you concur?

2. Deerfield Beach is presently attempting to regain beaches through the construction of groins. In this attempt it is feasible that entire portions, which were privately owned and which became totally submerged at high tide, may be regained as a result of the city's efforts. Could the property owners, at any time in the future, make a valid claim to these regained lots?

3. In the situation where the mean high tide line has passed the eastern right of way line of municipal streets and the city, through its erosion control devices, succeeds in regaining land, does the title to the regained land vest in the city as an accretion to the street right of way?

4. It is my opinion that where a vestige of any lot remains above high tide any rebuilding of the land, either by the city or by natural process, would vest title to the rebuilt land to the lot owner who still had a portion of his lot remaining, however small. Do you concur? Also, as it could be shown that the rebuilding by the city was taken as an emergency measure to protect the city's property just beyond the remaining vestige of the lot, and said emergency rebuilding could have been done by the property owner of the lot, is the position of the city changed at all?

With respect to question 1, the status of the fee title of the area which formerly was upland, but which now consists of submerged lands, is determined by the manner in which the land became submerged. Your letter indicates that part of the loss of these uplands has been due to sudden and violent action of the waves along the beach front and that a part of the loss is due to gradual and imperceptible action of the waves. The courts, and in particular the Florida courts, have adopted the legal principle that where the upland is lost by reason of avulsion and the effect and extent of which is perceptible, there is no boundary change. See *Siesta Prop., Inc. v. Hart*, 122 So. 2d 218, District Court of Appeal, 2nd Dist. In a recent case, as yet unreported, *Municipal Liquidators, Inc. v. Tench and Trustees of the Internal Improvement Fund*, this court cited with approval this case. In the *Siesta* case the court used the following language in discussing the proper rule to apply with respect to "erosion" and "avulsion":

The rule we think should govern in such a situation is set forth in *In Re City of Buffalo*, 206 N. Y. 319, 99 N. E. 850,

where it is stated: "When land bordering a body of water is increased by accretion—that is to say, by such a slow and gradual deposit of particles that its progress cannot be always measured even though its results may be discerned from time to time—the new land thus formed belongs to the upland to which it attached. By the same reason the rule is that, when the sea, lake, or navigable stream gradually and imperceptibly encroaches upon the land, the loss falls upon the owner, and the land thus lost by erosion returns to the ownership of the state. This is not the rule where the loss of the land occurs by avulsion, defined as the sudden or violent action of the elements, the effect and extent of which is perceptible while it is in progress. In such cases the boundaries do not change."

Using the legal principles enunciated by the district court of Florida as a guideline it is apparent that the title to that portion of what was formerly upland that has become submerged as a result of avulsion would remain vested in the upland owner. Under these circumstances the owner would no doubt want to continue to have such submerged parcels assessed for taxes so he might continue to pay taxes in the hope that such parcels would again become upland, either as a result of natural forces or by reason of the installation of groins or other works which would effect an artificially induced buildup of the upland property.

As to question 2, it appears to have been partially answered by the above reply to question 1. To supplement I might add that if the upland property was lost by a slow and imperceptible process there would be a boundary change of the private upland property and the title to the area which became submerged vested in the state. However, if any portion of this submerged area became upland again by the slow and imperceptible process of nature, which the courts refer to and describe as accretion, then title to such added area would vest again in the upland owner. See *Mexico Beach v. St. Joe Paper Co.*, 97 So. 2d 708; *Paxson v. Collins*, 100 So. 2d 672 and *Ford v. Turner*, 142 So. 2d 335.

If the city, in its efforts to regain beaches through the construction of groins, attempts to extinguish the riparian rights of the upland owners affected by such works, it would be my opinion that such a program should not be undertaken until these private upland owners have consented to and given their approval for such a program. Otherwise these upland owners might be justified in concluding that the city was attempting to extinguish their riparian rights without just compensation.

With respect to question 3, it is my opinion that the rights of the city concerning the right of way of a street which has been destroyed by the forces of wave action would necessarily be determined on the same basis as the riparian rights of private individuals. In other words, if the shoreline has gradually eroded away the right of way of the city street, then the city will have lost title to the right of way to the state by reason of such erosion. If, however, the right of way was destroyed by an act of avulsion, that is sudden and perceptible action of the ocean, then the title to the right of way remains in the city. The answer to the question as to the method whereby the right of way is destroyed would, of course, determine the question as to whether the city, by regaining the land through the process of erosion control devices, would also regain title to the area thus built up.

With respect to question 4, where you set forth your conclusions concerning the rights of private riparian owners, the manner in which

the upland has been destroyed would determine whether or not the private upland owner is entitled to any area which has been rebuilt, either by natural forces or through the efforts of controlled devices installed by the individual or by the municipality.

Since it is quite apparent that the manner in which the losses of upland property have occurred along your beach area can be attributed to both erosion and avulsion, the best solution to resolve the legal questions involved would be for the city to work out such an agreement with all riparian owners affected as would set forth the legal status of the title to the submerged areas being restored. The state, through the trustees of the internal improvement fund, has usually given its consent to such agreement insofar as its title interests in the submerged area being restored are concerned. The factual situation in each case would determine the position of the trustees as to whether they felt authorized to approve and consent to such an agreement.

It is my feeling that this procedure would afford adequate protection for the private as well as the public rights which would become involved in situations which you have described in your questions.

063-51—May 27, 1963

TAXATION

INTANGIBLE PERSONAL PROPERTY TAXES; LOANS UNDER §§631, ET. SEQ., TITLE 15, U. S. CODE—§199.11, F. S.; §1, ART. IX, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

To what extent are loans made under and pursuant to §§631, et seq., U. S. code, by a banking institution in conjunction with the small business administration, of the U. S., to the operator of a small business subject to class "C" intangible taxes in Florida?

We find in your file handed us with your request for opinion copy of a participation agreement, bearing date of March 12, 1963, by and between a banking institution doing business in Florida, the small business administration created and existing under §§631, et seq., title 15, U. S. code, and a business organization of this state transacting business in this state. By reference to this participation agreement we find that the said business organization made application, evidently to the banking institution, for a loan for business purposes in the principal sum of \$30,000, in which loan the small business administration "desires to purchase a participation of 75% of the loan or such part thereof as the bank may disburse to the borrower" (the business organization). Such "loan shall be disbursed by the bank subject to the terms and conditions set forth in the authorization of Small Business Administration dated August 1, 1962. . . ." The small business administration agrees that upon the written demand of the bank it will purchase from the bank "a participation of 75% of each disbursement made by the bank to borrower on account of the loan, immediately after such disbursement, for an amount of money equal to the amount of said participation. "Immediately upon each such purchase, bank will execute and deliver to Small Business Administration a participation . . . evidencing the interest in the loan so purchased." The participation interest of the small business administration is made subject to purchase by the bank at any time upon notice as re-

quired. Neither the small business administration nor the bank will sell or transfer its interest in the loan without the written consent of the other.

Although the promissory note and mortgage securing it are made to the bank, through the said participation agreement the small business administration immediately acquires an interest, in this case a 75% interest in the obligation and the lien securing its payment. A reading of the participation agreement reveals provisions thereon strongly indicating a joint agreement between the small business administration and the bank in substance providing for joint functions and control over the loans. At the time of the execution and delivery of the participation agreement, the small business administration and the bank have agreed as to the participation between them in making the loan. Although the bank seems to make the loan from its funds, the agreement provides for immediate or substantially immediate reimbursement of the bank by the small business administration. For many purposes in connection with the making of the loan and its collection the bank appears, from the participation agreement, to act for and in behalf of the small business administration. The interest of the small business administration in the note and mortgage is recognized by the participation agreement. Although the loan is made from funds of the bank and the documents are taken in its name, the small business administration, under the agreement, acquires an equitable interest in such documents pending the transfer to it by the bank of its interest therein; in this case a 75% interest. The legal title seems to pass from the bank to it as soon as the agency reimburses the bank its portion of the funds paid out by the bank.

Doubtless in some, if not most instances, the transaction has been completed, and settlement made between the bank and the small business administration, before the mortgage is offered for record to the clerk of the circuit court of the county. Under §1, Art. IX, State Const., taxes on such documents "shall be payable at the time such mortgage, deed of trust or other lien is presented for recordation." See also §199.11(3), F. S. Taxes on other classes of intangible personal property become delinquent on April 1 of the year next after the year for which the taxes are levied.

Due to the procedures set out in the participation agreement, above referred to and discussed, there is doubt as to the exact time the interest of the small business administration in and to the note and mortgage securing it vests; however, it seems that an equitable title or interest of the said administration vests as soon as the participation agreement is executed and delivered, with the legal title vesting as soon as the bank is reimbursed for the funds laid out by the bank in behalf of the small business administration. Generally taxing statutes are construed strictly against the taxing power and liberally in favor of the taxpayer. (84 C. J. S. 158, §58).

Under participation agreements, like or similar to the one above described, it will be presumed that the small business administration, as well as the bank and borrower, intended that at least the business administration obtain an equitable title to the percentage passing to it mentioned in the participation agreement, although the funds of the business administration will not be paid to the bank or the borrower immediately upon the execution of the said participation agreement. This interest belonging to the said business administration, an agency of the U. S., at least in equity belonged to the U. S. in substance. Belonging to the U. S. at the time of taxation it was not subject to intangible taxes in so far as said interest was

concerned. The interest of the bank would not, under the file before us, be entitled to tax immunity, and should be subjected to taxation.

063-52—May 27, 1963

COUNTY SCHOOL FINANCING

BOND ISSUE AUTHORIZED BY CH. 59-730, LAWS OF FLORIDA, OKEECHOBEE COUNTY—§18, ART. XII, STATE CONST.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

QUESTION:

Does Ch. 59-730, Laws of Florida, restrict the board of public instruction of Okeechobee county to the issuance of revenue certificates or other evidence of indebtedness in an aggregate sum of \$120,000, or may the county board issue the maximum allowed in the sum of \$120,000 and at some subsequent date or dates issue additional certificates of indebtedness, provided the amount outstanding within the statutory limitation of 20 years, does not exceed \$120,000 at any one time?

The intent of Ch. 59-730 in so far as it relates to your question appears to be similar to the provisions of §18, Art. XII, State Const., under which *different series of bonds* have been issued by the state board of education on behalf of the counties as sufficient funds accrue to the credit of the county to adequately secure the payment of said bonds. This interpretation of §18, Art. XII, State Const., has been followed and approved by the courts.

Section 5 of Ch. 59-730 specifically provides, in part, that "... provided that the aggregate of funds so pledged and set apart shall not in any one year exceed the sum of \$25,000." The title of said act provides, in part, "... certificates or other evidences of indebtedness at any time not exceeding in the aggregate the sum of \$120,000." (Emphasis supplied.)

In accord with the above, it is my opinion that different series of revenue certificates are authorized by Ch. 59-730 to be issued from time to time so long as the limitations imposed by the act are not exceeded.

063-53—May 29, 1963

COUNTY BOARDS OF PUBLIC INSTRUCTION

CONTRACTUAL AUTHORITY—EQUIPMENT LEASE AGREEMENTS—§§230.23(9)(d), (10)(i), 236.36-236.57, 237.02, 237.27, F. S.; §17, ART. XII, STATE CONST.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

QUESTIONS:

1. May a county board enter into a lease agreement for periods of more than one year for furnishing equipment of a non-consumable nature for use in the public school system?

2. If your answer to the above question is in the affirmative, are there any restrictions governing: (a) the length of term of said lease? (b) securing bids or quotations prior to entering into the agreement? (c) including in the lease insurance protection for the equipment?

County boards of public instruction are authorized to contract by §230.23(10) (i), F. S., for materials, supplies and services. Such authority would appear to apply to both purchase contracts and lease agreements. No specific limitation is imposed as to the periods of time covered by such contracts.

Section 237.27, F. S., however, limits obligations of county school boards to one year except under the terms and conditions specifically set forth in said act which include approval of the state board of education. Although this act was intended to apply to loans, it would appear to be equally applicable to any other form of obligation incurred, including leases of property. The county school board can also issue general obligation bonds payable over a 30-year period in accord with §17, Art. XII, State Const., and §§236.36-236-57, F. S.

It is my opinion, therefore, that county boards of public instruction may enter into lease agreements for furnishing nonconsumable equipment for any reasonable number of years, provided, however, that the lease must be conditioned on the right of the board to terminate the lease at the end of each fiscal year.

Section 237.02, F. S., should be followed, provided the total rentals paid will exceed \$300. See AGO 049-114 and 050-394. Where insurance is obtained it should be purchased in conformity with the provisions of §230.23(9) (d), F. S. It would appear that insurance covering the replacement costs of the items leased should be carried if the county school board by the lease agreement assumes responsibility for their loss by fire or other cause or unless by agreement the lessor carries adequate insurance on said items.

Your questions are answered in accord with the above observations.

063-54—May 31, 1963

REGULATION OF VOCATIONS AND PROFESSIONS

MASSAGE MACHINES; OPERATION BY UNLICENSED OPERATORS—PROHIBITION AGAINST LICENSES—CHS. 480, 205, §§480.02(3), 205.01, 205.15-205.19, 205.49, 205.52, 95.021, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

In the light of the opinion of the supreme court in *Snedeker v. Vernmar, Ltd.*, Fla. App., 151 So. 2d 439, should occupational licenses be issued to operators of such machines who have not been certified and registered by the board of massage examiners?

Your request for opinion poses the question of the application of the provision in §480.02(3), F. S., that "no occupational license, state, county or city, shall be issued to any person unless he or she shall have in his or her possession a certificate of registration and current certificate of renewal, duly authorized and signed by the board of massage examiners." When this provision is read and construed in the light of Ch. 480, F. S., it is apparent that it was aimed at those per-

sons operating massage machines, as well as those persons giving massages other than by machine, and designed as a protection of the health and safety of the public. Because of this provision in the statutes, this office by its opinion 059-168 of Aug. 28, 1959, held that occupational licenses should not be issued to masseurs and masseuses, including those using machines, unless and until they have in their possession certificates of registration and required renewals thereof, or until otherwise provided by a court or courts. Massage machines, including those operated by a coin without attendants, were prima facie within the purview of Ch. 480, F. S., and the above quoted portion of §480.02(3), F. S.; in the light of which we held, in said opinion 059-168, that occupational licenses should not be issued for the operation of massage machines until the operator thereof had qualified under said Ch. 480, or until the constitutionality and validity of said chapter was finally determined by the courts.

Vernmar, Ltd., a limited partnership under the statutes and laws of Florida, in July, 1958, brought litigation for the purpose of determining whether or not operators of the reducing system known and designated as the Stauffer System reducing establishments were within said Ch. 480, F. S., and whether those persons, firms and corporations operating such reducing establishments were masseurs or masseuses within said chapter and required to qualify and obtain a license under said chapter before operating in this state. The supreme court of Florida, on April 16, 1963, in the case of Snedeker et al (the board of massage examiners) v. Vernmar, Ltd., Fla., 151 So. 2d 439, held that said Stauffer system of reducing was not within the purview of Ch. 480, F. S., and was not required to qualify thereunder before operating in this state. This determines that the above quoted provisions from §480.02(3), F. S., is without application to those persons operating Stauffer system reducing establishments.

Chapter 205, F. S., imposes a license tax upon persons engaged in or managing any business, profession or occupation in this state (§205.01, F. S.) specifically providing specific license fees for many businesses, professions and occupations with a general provision for professions (§205.52, F. S.) and businesses not otherwise classified in and by Ch. 205, F. S. (§205.49, F. S.). Specific exemptions from license taxes are provided in §§205.15, 205.16, 205.161, 205.17, 205.18 and 205.19, F. S.; however, none of these exemptions extend to operators of the Stauffer system of reducing establishments. Such operators are subject to licenses and license taxes under their proper classification. Because of *Snedeker v. Vernmar, Ltd.*, supra, and the temporary injunction therein, we are informed that persons have operated reducing machines without occupational licenses required by Ch. 205, F. S.

"Unless otherwise provided by statute, lapse of time does not bar an action to recover the license or occupation tax." (53 C. J. S. 688, §53). There is no limitation on the collection of delinquent occupational licenses in this state, other than §95.021, F. S., which applies applicable 20-year limitations to the state, but not other and shorter limitations. The state and its "agencies are not ordinarily to be considered as within the purview of a statute, however comprehensive the language may be, unless intention to include them is clearly manifest." (82 C. J. S. 554 and 555, §317).

We are, therefore, of the opinion that upon the filing of the opinion in *Snedeker v. Vernmar, Ltd.*, Fla., 151 So. 2d 439, holding the operations of Vernmar, Ltd. not within the purview of Ch. 480, F. S., it takes such operation out of the purview of the above quoted provision

in §480.02(3), F. S., and makes the operation subject to license taxes under Ch. 205, F. S., not only for the current license year but for the past license years since the beginning of its operation in this state. This rule is applicable to massage machines, whether coin operated or otherwise, when within the purview of *Snedeker v. Vernmar, Ltd.*, supra.

063-55—June 3, 1963

COUNTY ORGANIZATION, OFFICERS

REJECTION OF BIDS NOT IN CONFORMITY WITH ADVERTISED CALL FOR BIDS—CORRECTION OF MINUTES OF BOARD OF COUNTY COMMISSIONERS

To: *Charles W. Luther, Attorney to the Board of County Commissioners, Daytona Beach*

QUESTIONS:

1. May a board of county commissioners reject a bid for test and foundation piling for the new county courthouse annex when such bid fails to conform to the plans and specifications for such project?

2. May a board of county commissioners amend the minutes of prior meetings of said boards to correct a scrivener's omission of a portion of such prior minutes?

AS TO QUESTION 1:

You advise that the board of county commissioners of Volusia county published a call for bids for the placing of test and foundation piling to be used in the construction of a county courthouse annex. Such call was for bids based upon the plans and specifications which were available to prospective bidders in the office of the architect for the project. Incorporated in the plans and specifications was the requirement that test and foundation piling on the project should be of prestressed and precast concrete.

In response to such call for bids, four contractors responded. The bids of three of said contractors conformed to the specifications. The fourth bidder, and in fact the lowest bidder, submitted his bid based upon the use of other than such prestressed and precast concrete piles.

We are given to understand that at the bid opening the architect employed by the board of county commissioners, at the request of the board of county commissioners, examined all bids for conformity with the call for bids and the plans and specifications. Upon the recommendation of the architect the bid of the fourth bidder was determined not to conform to such call and specifications and for that reason was rejected by the board of county commissioners.

It is well settled in this and other states that bids not responsive to the call for bids and when properly incorporated in such call, to the plans and specifications, may be summarily rejected by the awarding authority for that reason. See *Robert G. Lassiter & Co. v. Taylor* (1930) 99 Fla. 819, 128 So. 14, 69 ALR 689; *Wester v. Belote* (1931) 103 Fla. 976, 138 So. 721; *Universal Constr. Co. v. Gore* (1951, Fla.) 51 So. 2d 429. See also 43 Am. Jur. Public Works and Contracts, §46, wherein it is held that "Public authorities cannot enter into a contract with the lowest bidder containing substantial provisions beneficial to him not included in or contemplated in the terms and specifications upon which bids were invited; the contract which they execute must be the contract offered to the lowest responsible bidder by advertisement, and any contract entered into, containing substantial provisions bene-

ficial to the bidder which were not included in the specifications, is void. Any other course would prevent real competition, lead to favoritism and fraud, and defeat the purpose of the law in requiring contracts to be let upon bids made upon advertised specifications. A contract let upon the basis of anything else than the advertised plans and specifications would be one let without the competitive bidding which is necessary to give it validity."

As to the architect's participation in the review of the bids and his recommendation on such bids to the county commissioners — while we do not have a copy of the architectural contract before us, it should be noted that it is not uncommon for a governing authority to, in its call for bids, designate its employed architect as the board's representative to receive and open bids submitted. Even in the absence of such contractual provision it is well recognized that boards of county commissioners, as well as other governing bodies, may use the technical acumen of skilled persons to advise them in connection with decisions such boards must make. Because of the technicalities involved in the preparation of the foundation for the construction of a substantial building, we think it entirely proper for a board of county commissioners, as in this instance, to rely on the recommendation of its architect in determining whether bids submitted respond to the call and conform to the plans and specifications for a particular project.

Further, the project architect would, I believe, have a duty to advise the board of county commissioners on such subjects if his opinion was requested by the board. See *Crandon v. Hazlett*, 26 So. 2d 638. Question 1 is answered accordingly.

AS TO QUESTION 2:

You advise that the clerk, in transcribing the minutes of the board of county commissioners accepting the bid on test and foundation piling for the courthouse annex, inadvertently omitted the recording of the bids on the foundation piling, hence question 2 has been posed for our consideration.

It is a matter of public policy of this state that boards of county commissioners reflect all of their official actions in their minutes. We are aware of no prohibition against the correction of errors in such minutes by subsequent action of the board, particularly is it so where an obvious error is corrected and such correction is easily substantiated by the bids submitted. Question 2 is answered in the affirmative.

063-56—May 22, 1963

HIGHWAYS AND BRIDGES

DISPOSITION OF FEDERAL HIGHWAY REIMBURSEMENT FUNDS PAID ON ACCOUNT OF ROAD CONSTRUCTION FINANCED BY PLEDGE OF 80% SURPLUS GAS TAX REVENUE—§16, ART. IX, STATE CONST.; §344.26, F. S.

To: *Tommy Stevens, State Representative, Tallahassee*

QUESTION:

What disposition is to be made by the state road department of federal highway reimbursement funds paid on account of road construction financed by pledge of 80% surplus gas tax revenue restricted to expenditure in a county?

A brief review of the development of the law pertaining to this

question is in order. Generally, prior to the passage of §16, Art. IX, State Const., the individual counties of this state constructed roads which were subsequently designated as state roads; and the state then reimbursed the county for the cost of construction. The alternative procedure was that the counties advanced to the state road department sums of money to be expended in the construction of state roads which had been designated by the legislature of the state as state projects. It was recognized that certain of the counties had paid varying sums of money for said construction and that since the money was paid out on account of expenses of the state in construction of said state roads to and for the general benefit of the state, it was deemed proper that those sums be returned and repaid respectively to each county in the amount that such county had advanced.

The purpose of §16, Art. IX, State Const., was to stabilize the credit of each county, assure means of liquidating the counties' road construction obligations, and provide the counties with appropriate and secure means to enable them, through the state road department, to extend and improve the state system of roads within their territorial boundaries.

The amendment accomplished this purpose by constitutionally creating a state agency, theretofore statutory, to perform the function which previously had been performed by the 67 counties separately. The amendment transferred to the state board of administration the applicable powers of the county commissioners. The primary purpose of the acts and the amendment was to recognize the state's obligation to the counties for contributing to an important state purpose, to reimburse the counties with state funds for their expenditure and to set up a strong state agency to effectively and economically accomplish these ends.

The state board of administration assumed the obligations of the counties for the purpose of administering tax funds and is merely the fiscal agent of the county on matters of that nature. Further, the state board of administration is trustee for the county for that part of the gasoline tax funds allocated to liquidate bonds for the purpose of constructing county roads.

The lease-purchase agreement is the device by which the financing and constructing of state highways in the counties is accomplished. The terms of this agreement and an extension of the same plan provided in Ch. 21853, 1943, now §344.26, F. S., control the relationship between the counties and the various state agencies. These relationships are as follows: The state road department is the agent of the Florida development commission for the purpose of financing. In turn, the development commission is the agent of the individual counties for the purpose of carrying out highway construction.

The state road department, therefore, acts as agent for the counties through the Florida development commission. As agent, the road department has no greater authority over control of its funds than that manifested by its principal, the county.

A study of the constitutional amendment, the applicable statutes, and case decisions fails to disclose any explicit authority for the present distribution policy of the federal highway reimbursement money by the state road department. Therefore, the basic law of agency and trust, together with the applicable equity principle leads to the conclusion that moneys realized from the federal government for highway reimbursement are to be distributed to the counties from which the original 80% surplus gasoline tax fund was derived.

A revenue anticipation agreement of this nature carries through

its stages the legal impositions upon the basic funds. These certificates anticipated 80% surplus second gas tax funds required by the constitution to be expended for certain restricted road purposes in the particular county. The reimbursed funds thus had the identical restrictions as the bond funds they replaced, and the bond funds had the same restrictions as the gas tax surplus they anticipated.

Since under the agreements among the governmental agencies involved, the construction funds were expended from a construction trust fund of a particular county, it is the obligation of the state road department to deposit into said fund any reimbursements it received on account of such construction.

063-57—June 6, 1963

DIVISION OF CORRECTIONS

DISCHARGE GRATUITY, DISCHARGE CLOTHING, TRANSPORTATION—WHEN PRISONER ENTITLED TO—
 §§945.21, 944.54, F. S.

To: *Louie L. Wainwright, Director, Division of
 Corrections, Tallahassee*

QUESTIONS:

1. When the court order sets aside a judgment and sentence and provides for a re-trial, remanding a prisoner to the custody of the sheriff, is it the division's responsibility to pay this prisoner a discharge gratuity and provide him with a suit of clothing?

2. When the court order remands the prisoner to the custody of the sheriff so that the prisoner may be present at a hearing regarding his motion to the court, does the division have any obligation to pay gratuity and provide clothing?

3. In the cases of questions 1 and 2, whereupon the prisoner is returned to the court, and after the re-trial or hearing the court orders his release from custody and the prisoner is physically in custody of the sheriff, is the division of corrections responsible for providing the prisoner with discharge clothing, gratuity, or transportation? If so, how should this be accomplished?

Your said letter points out that:

In asking the question in 3 above, regarding the manner in which such payments might be made, I should advise you that the money for payment of discharge gratuity is on deposit in the bank in Tallahassee and is paid by check over the signature of the director.

The method of purchasing transportation is by travel voucher to the common carrier; these vouchers are in possession of the several institutions throughout the state.

The clothing furnished all male prisoners is purchased and warehoused at Florida state prison, Raiford, and must be altered to specific measurements and is then sent to the institution from which the prisoner is normally discharged. Section 945.21(1)(c), F. S., provides as follows:

945.21 *Regulations of the board.*—

(1) The board is authorized to adopt and promulgate regulations governing the administration of the correctional

system and the operation of the division. In addition to specific subjects otherwise provided for herein, regulations of the board may relate to:

* * *

(c) Gain time for good conduct of, *release payments to, and release transportation of, inmates;*

After the enactment of said statute, the board of commissioners of state institutions adopted the following rules relating to the release of prisoners:

190A-9.01 *Certificate of discharge.*—The Director of the Division of Corrections shall furnish to *each prisoner sentenced to the custody of the Division of Corrections* a certificate of discharge *when the prisoner* has completed the service of the sentence imposed by the court; has been granted a parole by the Florida Probation and Parole Commission; has been granted a pardon by the State Board of Pardons; or *has been ordered released by a court of competent jurisdiction.* Such certificate shall show the name and Division number, the court and county of conviction, the date of sentence, and the length of sentence and the date of discharge.

190A-9.02 *Discharge clothing.*—The Director is hereby authorized to provide *the inmate discharged as outlined above* with a suit of clothes, belt, shoes, socks, underwear, shirt and tie, in the case of male prisoners, and clothing of an equal value for female prisoners. In cases where the prisoner being discharged would prefer types of clothing other than those specified above, the Division of Corrections is authorized to provide other clothing of a value equal to that authorized above.

190A-9.03 *Release gratuity.*—The Director of the Division of Corrections is hereby authorized to make a release gratuity grant to *each prisoner as discharged under 190A-9.01 above* in such amount as the Legislature may from time to time provide for such purpose.

190A-9.06 *Release transportation.*—Within the funds made available by the Legislature under Section 944.54, Florida Statutes, release transportation shall be authorized at the discretion of the Director for all regularly discharged inmates as follows:

- (1) To the county from which sentenced, or
- (2) To the place of employment within the State of Florida, or
- (3) To the place of legal residence within the State of Florida, or
- (4) If the prisoner does not choose one of the above listed plans, then, within the discretion of the Director, release transportation may be authorized to the location recommended by the classification committee of the institution. (Emphasis supplied throughout quotation from rules of board of commissioners of state institutions.)

Section 944.54, F. S., specifically deals with the furnishing of transportation to released state prisoners. It reads as follows:

944.54 *Transportation furnished prisoners upon release.*—

- (1) The superintendents or wardens of the several state correctional institutions are authorized to furnish each prisoner, upon his release from a state correctional institu-

tion, transportation from such institution to such place as the classification committee may determine to be in the best interest of the prisoner. The transportation furnished shall be by the most economical means, utilizing a common carrier of the state, and such cost of transportation shall not exceed twenty-five dollars. The classification committee, may in its discretion, determine that the best interests of the state will be served by providing transportation for the prisoner to a place outside the state of Florida, in which instance transportation in excess of twenty-five dollars may be authorized with the excess being paid only from surplus transportation funds available to the institution. Provided, however, that the transportation furnished shall be the most economical available, utilizing a common carrier.

(2) Transportation as authorized herein shall be furnished by a *nonnegotiable travel voucher payable to the common carrier* being utilized and in no event shall there be any cash disbursement to the releasee or any person, firm or corporation. Such travel voucher shall not be valid sixty days after issuance thereof. (Emphasis supplied.)

AS TO QUESTION 1:

This question deals with whether a discharge gratuity and suit of clothing should be furnished to a state prisoner when the trial court has set aside his sentence, ordered a new trial, and remanded him to the custody of the sheriff to await such trial.

One of the main purposes of furnishing a prisoner a discharge gratuity and a suit of clothing is to aid in his rehabilitation after he is released from custody. The discharge money is to give him something to live on until he can obtain employment and begin to earn a living. The suit of clothing is to enable him to present a respectable appearance and afford him a better chance to successfully cope with the outside world. These purposes would not be served by furnishing a discharge gratuity and a suit of clothing to a prisoner who is being held on the same charge that resulted in the vacated sentence and who may well return to prison within a short time under a new sentence for the same offense or a lesser included offense. Therefore, I think that question 1 is properly answered in the negative.

However, the prisoner would be entitled to receive said items if he should later be ordered released because of a verdict of not guilty or a nol-pros.

AS TO QUESTION 2:

This question relates to a prisoner whose motion to vacate sentence is pending in the trial court, which has placed him in the custody of the sheriff for presentation at a hearing on the motion. Such an order is not an order that the prisoner be released and, therefore, such a prisoner is not entitled to be furnished a discharge gratuity or clothing.

AS TO QUESTION 3:

This question relates to whether a state prisoner who is in the physical custody of the sheriff is entitled to discharge clothing, a release gratuity, and/or transportation when the trial court vacates his sentence and either orders him released or orders a new trial which results in his acquittal and release.

It is my opinion that an order of release under either of these circumstances amounts to an order of a court of competent jurisdiction for the release of the prisoner within the contemplation of the above quoted rules and statute and makes him eligible to receive all of said

items. The fact that he is in the actual physical custody of the sheriff at the time such an order of release is made does not alter this opinion. I think that a state prisoner is eligible to receive said items when his sentence is set aside and he is released from further prosecution under the indictment or information upon which the vacated sentence was based, and this is accomplished when the court sets aside his sentence and releases him without a new trial or as the result of an acquittal at a new trial.

It is apparent that where the prisoner is released in the county in which he was sentenced, there are practical problems connected with supplying him discharge clothing, gratuity and transportation (if there is a discretionary allowance thereof to a place outside of such county).

There would be no particular difficulty involved in paying him a discharge gratuity, since a check for the same could be sent to him at such address as he may furnish to the division of corrections.

As to transportation (if any is furnished to a place outside of the county where the prisoner was sentenced), it would have to be by way of a travel voucher payable to the common carrier furnishing the transportation and the only way that the mailing of such a voucher to him could benefit him would be for him to remain in the county in which he was sentenced until he could obtain the voucher from the division of corrections by mail.

The matter of clothing presents the greatest problem, since all men's clothes are warehoused at Raiford and ordinarily the suit of clothing furnished a prisoner must be altered to fit him. However, if he should forward the necessary measurements to Raiford, then, whether they are accurate or not, the clothing could be altered accordingly and forwarded by parcel post to such address as might be specified by the prisoner. Or, if he should request a suit without alterations, it could be sent to him in the same manner.

You will understand that nothing in this opinion has any bearing on a situation where the prisoner whose sentence is vacated has another uncompleted state prison sentence.

063-58—June 7, 1963

CRIMINAL PROCEDURE

SERVICE OF SEARCH WARRANT ISSUED BY COUNTY JUDGE—WHO MAY SERVE, WHERE—§37.16, F. S.

To: *F. R. Galbreath, Constable, Volusia County,
New Smyrna Beach*

QUESTIONS:

1. Can a constable from one district execute a search warrant issued by the county judge in another district within the same county?
2. In the event the constable from the outlying district executed a search warrant in a district other than his own, would the criminal penalties as outlined in the statutes be applicable as regards the impersonation of an officer?

STATEMENT OF FACT:

The county judge of Volusia county issued a search warrant for the search of a dwelling located in the 10th justice of peace district, Volusia county, in the city of New Smyrna Beach. This warrant was placed in the hands of a constable of the 12th justice of peace district, Volusia county, for serv-

ice. The constable, with the aid of three citizens, made a search and seizure in the 10th district.

I have examined the AGO 69 for the year 1950; AGO 72 for the year 1950; AGO 612 for the year 1950 and AGO 57 for the year 1941. All of these opinions seem to have some bearing on the question at hand, but do not fully answer it.

Unless there be some specific grant of authority, the constable has no jurisdiction beyond the territorial limits of the district for which he was elected. However, there are certain statutory grants of authority which specifically permit certain official acts of constables beyond the territorial limits of their districts.

Section 37.16, F. S., provides that:

Executive officer.—The sheriff or any constable of the county shall be the executive officer of the courts of justice of the peace but if the sheriff or constable shall, for any reason, be disqualified or unable to act, the justice of the peace may appoint any individual, not interested in the case on trial, to serve process and to perform all duties of such executive officer. *Any constable of the county in which the process issued may serve the process of the county judge's court and justice of the peace courts in any district of said county where the same may be lawfully served, provided he shall not be entitled to greater mileage in any case in serving writs from courts of justice of the peace than he would be if the writ issued from such court in the district in which such constable resides and for which he was elected. (Emphasis supplied.)*

By virtue of the above statute, it is my view that a constable of the county in which the process issued (in your case, the search warrant) is authorized to serve the process or execute the warrant issuing from the county judge's court or, for that matter, from any of the several justice of the peace courts in any district of said county, where they may lawfully be served.

I have so concluded on several prior occasions; AGO 050-150, 050-414 and 053-06 in particular. In line therewith, and because I am aware of no reason upon which to base a departure therefrom, I would answer question 1 in the affirmative.

Inasmuch as I know of no rational basis upon which to conclude that a search warrant is not within the "process" contemplated by §37.16, supra, it would appear that if the constable from the outlying district executed a search warrant in a district other than his own, he cannot be subject to any criminal penalties attendant upon the impersonation of an officer. I assume of course that the search warrant is a valid one issued by a duly authorized county judge. I would therefore answer question 2 in the negative.

063-59—June 7, 1963

COUNTY SCHOOL SYSTEM

DISPOSAL OF SCHOOL PROPERTY—TERMS FOR SALE— \$235.04, F. S.

To: Thomas D. Bailey, State Superintendent of
Public Instruction, Tallahassee

QUESTION:

Based on the following facts, does a county board of public instruction have legal authority to sell property which has been determined unsuited for school purposes

and permit the purchaser to make payments over a period of several years?

STATEMENT OF FACT:

On April 11, 1962, the school board determined that a school building and school site were no longer suited for school purposes. Subsequently, the property was duly advertised in several newspapers with a request for bids. At the time of the bid opening, only one bid was received. Because the bid offer was below the appraised value of the property, it was rejected. The bidder then negotiated with the school board and offered to purchase the property at its appraised value. The board then by resolution sold the said property for the sum of \$155,000 to be paid as follows:

\$ 5,000 binder
\$ 15,000 upon delivery of abstract
\$135,000 on June 1, 1963, with \$1,061 of this amount to be charged for use of building until June 1, 1963.

The purchasers now advise that they are unable to complete the sale as provided in the contract. They have indicated a desire to pay interest at a rate of 5% per annum in advance on the unpaid balance on June 1, 1963 and June 1, 1964, and to close out the transaction on June 1, 1965. During this time the county board would continue to be in possession of the property, but would not occupy the same because the board has no further use for it.

Section 235.04, F. S., provides the procedure for disposing of school property which is not needed for school purposes. This act provides:

Disposal of school property.—The county board may dispose of any school land or property which is by a resolution of such county board determined to be unsuited for school purposes either because of location, condition, or other cause. The county board shall take diligent measures to dispose of school property *only on the most advantageous terms by public or private sale*. If, in the opinion of the county board, said school land or property to be disposed of is worth over five hundred dollars, *then said county board shall have such property appraised by three qualified appraisers acting as a body and shall not accept a price less than the appraised value* placed on such land or property by said appraisers; provided, that where trade-ins are involved in the replacement of worn-out equipment the dealers' bids, after at least three have been requested in accordance with law, would constitute a legal appraisal. The official minutes of the school board shall set forth the name of the purchaser, the sale price, and, if the same is over five hundred dollars, the appraised value, and the identity of the three appraisers in each such transaction.

Each deed conveying any school land under the provisions of this law shall have a certificate attached thereto signed by the county superintendent of public instruction of such county that all the provisions of this law have been complied with. Such certificate shall be proof of the validity of such deeds. (Emphasis supplied.)

The above statute does not require the purchaser of school property to pay cash.

Assuming that the property was appraised by three qualified ap-

praisers and other requirements of the act have been properly observed, it is my opinion that a county school board may exercise its discretion in entering into a contract for sale permitting the purchaser a reasonable amount of time in paying for the land, provided that the board acts in good faith "... to dispose of school property only on the most advantageous terms. . . ."

It is the responsibility of the school board, acting within its sound discretion, to determine whether the conditions described in your letter constitute a sale on the most advantageous terms to the school system.

I assume title to the property would not, of course, be conveyed until the transaction was completed and the full purchase price plus stipulated interest had been paid.

Subject to the above observations, your question is answered in the affirmative.

063-60—June 10, 1963

TAXATION

TRUSTEES IN BANKRUPTCY, REFUND OF PENALTIES— CONSTRUCTION OF §93(j), TITLE 11, U. S. CODE— §§193.40, 200.27, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are trustees in bankruptcy in this state entitled to refunds of penalties paid to county tax collectors in this state as penalties paid in connection with delinquent real estate and tangible personal property taxes imposed in this state?

This office, by AGO 058-84, of March 10, 1958, held that real estate taxes, unpaid on April 1 following the year in which real property is assessed for taxes, become delinquent on said April 1, with a penalty, in the form of interest at the rate of 18% per annum from said April 1 until the holding of the tax sale, and, if not redeemed prior to said tax sale, with interest at the rate of 12% per annum, until April 1 of the following year, then thereafter at the rate of 8% per annum. Under §200.27, F. S., tangible personal property taxes, not paid prior to April 1 following the tax year, become delinquent and bear interest at the rate of 1% per month, or 12% per annum. Persons redeeming their real or tangible personal property after said April 1 are required by the Florida Statutes to pay the said penalties or interest as a condition to redeeming said property from tax liens imposed by the Florida Statutes.

Under §93(j), title 11, U. S. code, "debts owing to the United States or any state or subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law." (Emphasis supplied.) This language of the statute was considered by the supreme court in *Simonson, Trustee v. Granquist*, 369 U. S. 38, 82 S. Ct. 537, 7 L. ed. 557, text 559, where the court remarked that "unquestionably that language is broad enough to bar all penalties, whether secured by lien or not, and we think the section was designed to do precisely that, for it plainly manifests a congressional purpose to bar all claims against a bankruptcy of any kind except those on account of

which the claimant has suffered a 'pecuniary' loss." In this case the U. S. sought to collect a tax penalty against the estate of a bankrupt, secured by perfected liens; the court held such claims barred by said bankruptcy statute. In *New York v. Jersawit*, 263 U. S. 493, 44 S. Ct. 167, 68 L. ed. 405, the state imposed a 10% penalty upon a delinquent franchise tax and 1% per month in addition thereto until paid. These impositions were held penalties disallowed under the federal bankruptcy act. See also *U. S. v. Phillips*, CCA Tex., 267 F. 2d 374, text 375 and 376; and *U. S. v. Harrington*, CCA N.C., 269 Fed. 2d 719, text 724. The impositions on delinquent real estate and tangible personal property taxes mentioned in the first above paragraph appear to be penalties within the bankruptcy act, especially §93(j), title 11, U. S. code.

Section 193.40, F. S., provides that the state comptroller "shall pass upon and order refunds where payment has been made, voluntarily or involuntarily, of taxes assessed on the county tax roll by reason of either of the following circumstances: (1) an overpayment; (2) payment where no taxes were due; and (3) where a bona fide controversy exists between the tax collector and the taxpayer. . . ." In the light of §93(j), title 11, U. S. code, an overpayment of taxes occurs when a trustee in bankruptcy makes an illegal payment of penalties and interest on taxes due the state, a county or a municipality, or other taxing agency, in violation of the above mentioned federal statute. The fact that the trustee in bankruptcy may have voluntarily paid the said penalties makes little if any difference, as the federal statute is designed to preserve the assets of the bankrupt and prevent preferences.

To entitle the trustee in bankruptcy to a refund he should make a proper application for the refund to the clerk of the circuit court, furnishing the state comptroller with a copy thereof by mail. There is no provision in the statutes and laws of Florida for county tax collectors to make such refunds.

063-61—June 12, 1963

STATE OFFICERS AND EMPLOYEES—RETIREMENT

STATUS OF OFFICERS AND EMPLOYEES OF THE JACKSONVILLE-DUVAL AREA PLANNING BOARD—CHS. 61-2329, 1961, 21874, 1943, LAWS OF FLORIDA; §122.02(1), F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are the officers and employees of the Jacksonville-Duval area planning board, created by Ch. 61-2329, within the purview, intent and operation of Ch. 122, F. S. and required to be members thereof?

Section 122.02(1), F. S., defines "state and county officers and employees," as including "all full time officers or employees who receive compensation for services rendered from state or county funds . . . provided that such compensation, in whatever form paid, shall be specified in terms of fixed monthly salaries by the employing state or county official." (Emphasis supplied.) This statutory provision in legal effect deems a person a county officer or employee when he "receives compensation for services rendered from . . . county funds," where such compensation is specified in terms of fixed monthly salary. Not being advised as to the manner and time of payment by the Jacksonville-Duval area planning board to its officers and employees we will, for the purposes of this opinion, assume that they are paid in

terms of fixed monthly salaries.

The Jacksonville-Duval area planning board was organized and established under and pursuant to Ch. 61-2329. This area planning board is composed of seven members; two ex officio members and five members appointed by the governor. The ex officio members are selected, one from the membership of the board of commissioners for Duval county, and one from the membership of the city commission for Jacksonville. This planning board may appoint an advisory board to assist it in carrying out its duties and obligations. Among other powers, the planning board may "appoint, employ and dismiss at pleasure, such employees, auditors, engineers and attorneys as the board may deem necessary to carry out the purposes" of said Ch. 61-2329. The said board may employ a full time professional planner and an appropriate staff in order to develop a comprehensive plan for physical development in the Jacksonville-Duval county area.

Section 6 of said Ch. 61-2329 provides that the said planning board is required to adopt a proposed annual budget for each calendar year, which annual budget, when adopted by the planning board, must be filed with the "Duval County Budget Commission according to the terms of Section 5 of the Duval County Budget Commission Act (Chapter 21874, Acts of 1943, with amendments and extensions) on or before May first of each succeeding year." Under said Ch. 21874, 1943, the board of county commissioners, the county board of public instruction, and all other boards, commissions and officials of Duval county must submit operating budgets to the said county budget commission. Under said Ch. 21874, 1943, the county budget board is authorized to adjust and approve an operating budget to the above mentioned county boards, commissions and officers. "Every such board shall be final and shall have the force and effect of fixed appropriations determined by the authority of law which shall not be altered or amended by any such board or officer or member thereof. . . ." Under §13, Ch. 21874, 1943, the millages approved for the purpose of supplying funds for such budgets so approved are imposed by the county for county purposes. These observations lead us to the conclusion that the Jacksonville-Duval area planning board operates on county funds within the purview of said §122.02(1), F. S. This conclusion is supported by the fact that the board of county commissioners was authorized to levy such a millage as would produce \$50,000 per annum for the years of 1962 and 1963.

This brings us to an affirmative answer to the above posed question. However, to become a member of the retirement system one must receive a monthly salary; reimbursement of expenses is not a salary.

063-62—June 12, 1963

CRIMINAL PROCEEDINGS

VACATION OF SENTENCE—EFFECT UPON CUSTODY OF PRISONER AND NEW TRIAL—LENGTH OF NEW SENTENCE—\$782.07, F. S.

To: John U. Bird, Circuit Judge, Clearwater

QUESTIONS:

1. When a trial court grants a defendant's motion to vacate and set aside his sentence, is such defendant entitled to go free?
2. When a trial court grants a defendant's motion

to vacate and set aside his sentence and he is thereafter tried and convicted again on the same charge, may such court impose a longer sentence to imprisonment than the one which was vacated?

AS TO QUESTION 1:

A motion to vacate sentence under Florida criminal procedure rule 1 constitutes a collateral attack upon such sentence. Said rule is an exact duplicate of §2255, title 28, U. S. code, which applies to persons in custody under sentences imposed by U. S. courts, except for such changes as were necessary to make said rule apply to persons in custody under sentences imposed by Florida courts. In *U. S. v. Hayman*, 96 L. Ed. 232, 243, the U. S. supreme court, speaking of the character of a proceeding under §2255, said:

... a proceeding under §2255 is an independent and collateral inquiry into the validity of the conviction. . . .

Since said criminal procedure rule 1 is to the same effect as said §2255, it necessarily follows that a proceeding under said rule is also a collateral inquiry.

Before the adoption of said rule, the grounds upon which a motion to vacate sentence may now be made under its authorization were available on a collateral attack by way of habeas corpus. To the extent that said rule authorizes a motion to vacate, it is a substitute for the remedy of habeas corpus, which also involves a collateral inquiry. Formerly, a state prisoner could apply for a writ of habeas corpus to any Florida court with power to issue such writs and with jurisdiction over the place where he was confined, while said rule requires that a motion to vacate sentence be made to the court which pronounced the sentence. As I see it, the primary purpose of the rule is to permit a collateral attack upon a sentence to be heard by the trial court in the county where the sentence was imposed and where the court records are located and the available witnesses are apt to be found, it having formerly been necessary in many habeas corpus cases instituted outside the counties in which the sentences were imposed to obtain certified copies of the court records for use as evidence and to bring witnesses long distances to testify in opposition to the petitioners' claims.

Since both habeas corpus proceedings and motions to vacate sentences under said rule involve collateral inquiries, and since, insofar as said rule authorizes a motion to vacate sentence, such a motion is a substitute for habeas corpus, the rulings of the supreme court of Florida as to what should be done with prisoners whose convictions were struck down in habeas corpus proceedings are equally applicable to prisoners whose sentences are vacated upon motions made by them under said rule. Therefore, we will refer to a few of the decisions of the supreme court of Florida on that subject.

In *Reffkin v. Mayo*, 155 So. 674, text 678, a habeas corpus case, the supreme court of Florida said:

Where the particular custody is illegal and the prisoner is entitled to be discharged therefrom, it does not follow that he is entitled to an absolute release and discharge from all custody.

* * *

If sufficient ground appears, the court may refuse to discharge the petitioner absolutely, even if the particular custody is illegal, and order that he be held to be dealt with according to law.

In *Blackburn v. Cochran*, 114 So. 2d 684, a habeas corpus case, the supreme court of Florida ruled that Blackburn was legally insane

when he was convicted, vacated the judgments and sentences pronounced against him, and remanded him to the custody of the sheriff of Pinellas county (in which county he had been convicted) for further proceedings upon the informations filed against him.

In *Cash v. Culver*, 122 So. 2d 179, a habeas corpus case, the supreme court of Florida struck down Cash's conviction because he had been deprived of a reasonable opportunity to obtain counsel of his own choice and ordered that he be detained in custody subject to another trial in due course of law.

In *McGuirk v. Cochran*, 126 So. 2d 555, a habeas corpus case, the supreme court of Florida ordered that McGuirk be discharged from further imprisonment under the judgment which had been imposed upon him, for the reason that he was an unmarried minor and his parents had not been given the notice required by law, and remanded him for trial on the charges of the information pursuant to which he was originally incarcerated.

It is my opinion that question 1 should be answered in the negative because a person whose sentence has been vacated upon a motion made by him under said rule is not entitled to be discharged from custody but is subject to being held for a new trial. Because of the fact that he is the actor in having his sentence vacated, he has no right to complain of being required to further answer the criminal charge against him.

AS TO QUESTION 2:

Whenever a defendant procures his sentence to be set aside, whether on direct appeal or on habeas corpus or by motion under criminal procedure rule 1, and is thereafter again convicted on a new trial, he is subject to having imposed upon him the maximum penalty authorized by statute even if it is more severe than the sentence which was set aside.

In *Stroud v. U. S.*, 251 U. S. 15, it appeared that Stroud was convicted of murder in the first degree without capital punishment and was sentenced to life imprisonment; that he appealed and obtained a reversal; and that he was again tried, found guilty without qualification as to punishment, and sentenced to be hanged. After this last conviction and death sentence, he appealed to the U. S. supreme court and claimed that he had been placed in double jeopardy. That court affirmed, pointing out that "... the plaintiff in error himself invoked the action of the court which resulted in a further trial. In such cases he is not placed in second jeopardy within the meaning of the Constitution."

In *King v. U. S.*, 98 Fed. 2d 291, decided by the U. S. court of appeals for the District of Columbia, it appeared that after King had served a portion of his sentence, he procured his release in a habeas corpus proceeding and was thereafter given an increased sentence for the same offense; and that he took an appeal and claimed that the new sentence was invalid because it increased his punishment. In affirming the increased sentence, the said court of appeals pointed out that, since King was the actor in procuring his first sentence to be set aside, it was not important that he did so in a habeas corpus proceeding instead of by direct appeal.

In *Robinson v. U. S.*, 144 Fed. 2d 392, decided by the U. S. circuit court of appeals for the 6th circuit, it appeared that Robinson was convicted of kidnaping and given a life sentence; and that he thereafter procured his sentence to be struck down in a habeas corpus proceeding upon the ground that he did not have counsel and did not intelligently waive counsel. Thereafter, he was furnished counsel,

pleaded not guilty, and was tried, convicted, and sentenced to death. He took an appeal and said court affirmed, pointing out that it was not material that Robinson attacked his original judgment and sentence collaterally by habeas corpus instead of directly by appeal.

The supreme court of Florida has followed the rule recognized by the above-cited federal decisions. In *Tilghman v. Culver*, 99 So. 2d 282, it appeared that on Oct. 22, 1954, the trial court sentenced Tilghman to serve a term of 10 years in the state prison; that on July 22, 1955, in the case of *Tilghman v. Mayo*, 82 So. 2d 136, a habeas corpus case, the supreme court of Florida rendered its opinion that said sentence was invalid and ordered that Tilghman be remanded for re-sentencing; and that on Aug. 22, 1955, the trial court re-sentenced him to serve 15 years in the state prison. He thereafter attacked said 15-year sentence and the said supreme court upheld the authority of the trial court to re-sentence him to serve 15 years after the 10-year sentence which it had previously imposed had been struck down, and remanded him to custody to finish serving said 15-year sentence. On this point, the supreme court said:

... we find that it is possible for the trial judge on resentencing to impose a greater sentence than he imposed before. See *State ex rel Rhoden v. Chapman*, 1937, 127 Fla. 9, 172 So. 56. For the above reasons we will not disturb the fifteen year term of which petitioner now complains.

And, as late as May 24, 1963, in the case of *Allan B. Michell, Sheriff, v. State ex rel John Thomas Callahan*, the district court of appeal for the 2nd district of Florida, ruled that it was lawful to impose a more severe sentence upon Callahan after the trial court, without any application by him, had set aside his conviction and sentence, a part of which he had served. On April 19, 1962, he was sentenced to serve one year in the county jail. On May 24, 1962, after he had served a portion of said sentence, the trial court, of its own motion, vacated and set aside his plea of guilty, the adjudication of guilt and said sentence because they were void on account of the fact that he was a minor and his parents had not been notified as required by statute. An amended information was filed, to which he pleaded *nolo contendere* after notice to his parents. The trial court sentenced him to serve seven years in the state prison. In a habeas corpus proceeding, the circuit court ruled said seven-year sentence invalid and directed the trial court to impose a sentence no longer than the original one-year sentence. Sheriff Michell, who had Callahan in custody, appealed and the said district court reversed and held that the trial court had the authority to impose said seven-year sentence.

Since a defendant can be given an increased sentence after he has procured a reversal on direct appeal, and since he can be given an increased sentence after he has procured the first one to be set aside by collateral attack in a habeas corpus proceeding, and since he can be given an increased sentence after the trial court has acted upon its motion in setting aside his conviction and the sentence based thereon because of the fact that the conviction was void, there is no room to doubt that he can be given an increased sentence after he has procured his first one to be vacated by making a collateral attack in the form of a motion to vacate under Florida criminal procedure rule 1. For example, if a prisoner procures his 10-year sentence for manslaughter to be set aside on a motion made under the said rule and is later convicted again, the court has the legal right to impose a 20-year sentence (the maximum fixed by §782.07, F. S.).

If a more severe sentence is imposed after the first one is vacated,

the trial court should "take into account" the time served on the vacated sentence and any gain time earned (*Perry v. Mayo*, 72 So. 2d 382; *Tilghman v. Mayo*, 82 So. 2d 136); stated in other words, "credit should be given" the defendant for the time he has served under the void sentence (*Velluci v. Cochran*, 138 So. 2d 510), plus, of course, any unforfeited gain time earned by him while so serving. These credits may be allowed in the manner suggested in my memorandum of April 24, 1963, to "All judges of the state of Florida having trial jurisdiction in felony cases."

063-63—June 14, 1963

CITIES AND TOWNS

AUTHORITY OF MUNICIPALLY-OWNED UTILITIES TO UNDERWRITE PART OF PURCHASE PRICE OF APPLIANCES TO PROMOTE SALE OF ELECTRICITY— CH. 59-1481, LAWS OF FLORIDA, §10, ART. IX, STATE CONST.

To: J. Hardin Peterson, Jr., City Attorney, Lakeland

QUESTION:

Is the city of Lakeland, which operates a municipal electric plant, authorized under its charter to underwrite part of the purchase price of electrical appliances sold to private individuals for the purpose of furthering the sale of the city's electric service?

You indicate that the city of Lakeland has joined with the local appliance dealers in a campaign to promote the sale of electricity; and that accordingly, the city plans to contribute \$20 to purchasers of certain major electrical appliances from the local electric appliance dealers either as a direct rebate or as credit on their utility bill.

You call our attention to §11, Ch. 59-1481, constituting the charter of the city of Lakeland which empowers the city commission:

... to provide the city with a system of waterworks and electric and gas lighting, and to operate, extend or modify the same within or beyond the territorial limits of the city, and to acquire and hold by grant, lease, purchase or conveyance or otherwise all such rights or privileges, corporeal or incorporeal, as may be necessary and incident to the execution of this power; ... (Emphasis supplied.)

There have been treatises and cases discussing the municipal operation of electric plants holding among other things that in performing such function, the city acts in a proprietary capacity as distinguished from its governmental capacity (108 A. L. R. 1454; 11 Fla. Jur. §17; 18 Am. Jur. §38; *Hamler v. City of Jacksonville*, 122 So. 220). Accordingly, it has been additionally stated that a municipality is governed by the same laws and may exercise the same rights and powers as private individuals and corporations acting under the same circumstances (*Hamler v. City of Jacksonville*, supra). In furtherance of the foregoing, it has been held that a municipal corporation with the express authority to operate an electric plant may lawfully as an incident thereto sell and install electrical apparatus and supplies. (See *Hamler v. City of Jacksonville*, supra.)

However, while the treatises indicate the foregoing sale and installation of electric apparatus is incidental to operating an electric plant, I have been unable to find any authority that would serve as a nexus upon which to base the city's contribution of \$20 to purchasers

of certain major electrical appliances from private appliance dealers to further the sale of electrical energy. It would seem that the promotion of the city's electric utility in this manner is too far removed from the general power to operate an electric utility.

A word of caution in a similar regard was expressed by Justice Brown concurring specially in the Hamler case, *supra*, which, incidentally, involved merely the question of the propriety of installing electric wire in private homes to furnish city electricity:

BROWN, J. (concurring specially). While the city may not be required to stop at the property line, but may connect its electric plant by wires leading from the street into private homes, when desired by the owners, so as to connect with the electric lights, electric ranges, water heaters, etc., in the homes of its citizens, *I seriously doubt if it can go further, and enter the domain of private business by selling and installing such electrical apparatus, as stoves, heaters, etc., which latter can best be left to private business and the free play of competition.* As I understand this case, the city is only seeking to furnish electric current for light and heating purposes and carry such current by necessary wire connections to the consumer, at the point of consumption. This is consistent with the public utility and public purpose authorized by its charter. *It cannot arbitrarily and unnecessarily enter the field of private business.* See *Keen v. Waycross*, 101 Ga. 588, 29 S. E. 42. In fact, I doubt the constitutional power of the Legislature to authorize municipalities to enter the domain of private business. (Emphasis supplied.)

I am inclined to believe in view of the foregoing that the city charter of the city of Lakeland does not presently contain sufficient authority upon which to predicate this promotional campaign as an incident thereto. Because of the absence of any clear-cut decision in this area, it would appear advisable to seek a judicial determination of this matter. Additionally, there also appears to be no analogous decision with respect to the question of whether this transaction would constitute a pledge of the credit of the city within the prohibition of §10, Art. IX, State Const. I believe that the gravity of the situation and the absence of judicial precedent would dictate resort to the courts in order to resolve this matter with any degree of finality.

Your question is therefore answered in the negative.

063-64—June 14, 1963

APPOINTIVE PUBLIC OFFICERS

TERM OF OFFICE OF BOARD MEMBER WHEN AREA FROM WHICH APPOINTED, CHANGED OR ABOLISHED—CHS.
61-691, 63-659, LAWS OF FLORIDA; ART. II, STATE CONST.

To: *Etter Usher, State Senator, Tallahassee*

QUESTION:

Does the term of office of a member of the governing board of a water management district continue although the act which created the district provides that said members be appointed from specific geographical areas and an amendment to that act eliminates the area from which said member was appointed?

Article II, State Const., provides for the division of the powers of the state government and prohibits any one department from encroaching upon any powers appertaining to either of the other departments. The creation of a water management district is clearly within the power of the legislature. The manner in which the members of the board of governors are to be distributed throughout the district and the lengths of their respective terms are also within the jurisdiction of the legislature.

An act creating a water management district and a board of governors thereto vests in the governor a particular and explicit power of appointment. That appointive power, duly exercised, is not affected by a subsequent act which reduces the geographic area of the water management district but remains silent as to the question of reorganization or redistribution of the members of the governing board of said district; that is, for the length of the term of the present appointee.

Further authority for the statement that redistricting which results in leaving an officer outside a district does not vacate his office can be found in Throop on Public Officers, §426.

Proceeding from the general to the specific, Ch. 61-691, created the southwest Florida water management district and stated the manner in which the members of the governing board of the district shall be appointed. Essentially, the act provided that each member reside in a county located in certain watersheds or river basins. Further qualifications are not pertinent hereto.

The 1963 legislature then amended the above act for the purpose of eliminating a particular watershed or river basin from which a member of the governing board had been appointed pursuant to the original act. Said amendment was silent as to any change, if any, to be made in the incumbent governing board. The question arises whether the elimination of an area from which a member of a governing board has been appointed would eliminate that member from the governing board or abolish his further rights to hold his office during the term for which he was appointed.

My opinion is that an office which the law contemplates shall continue in existence as created remains in existence until the expiration of its term, *unless otherwise provided by law*, even though the boundaries of the district which gave rise to the office be re-defined.

Your question is accordingly answered in the affirmative.

063-65—June 16, 1963

TAXATION

REQUIREMENTS AS TO PAYMENT OF BID AT TAX DEED SALE—§§194.21, 194.22, 193.57, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Must tax deed sales held pursuant to §194.21, F. S., by the clerk of the circuit court, be for cash only payable immediately after the acceptance of the bid by the purchaser?

Section 194.21, F. S., provides: "all lands advertised for sale to the highest bidder (in connection with a tax deed sale) shall be sold at public auction by the clerk of the circuit court of the county wherein such lands are located. . . ." We find nothing in the statutes relating to tax deed sales expressly requiring that such sales be for cash or otherwise. The following language found in §194.22, F. S., may indicate

that such sales should be for cash, to-wit: "If the property shall be purchased by a person other than the certificate holder, the clerk shall *forthwith* pay back to the certificate holder all of the sums he has paid. . . ." The term *forthwith* is defined in Black's law dictionary as meaning "immediately; without delay, directly, hence within a reasonable time under the circumstances of the case; promptly and with reasonable dispatch." Section 193.57, F. S., relating to delinquent tax sales by the county tax collector, provides that the "tax collector shall require immediate payment by any person to whom any parcel of such lands may be struck off, and in all cases where the payment is not made within twenty-four hours he may declare the bid canceled and sell the lands again on the following day." These sales often continue from day to day; tax deed sales under §194.21, F. S., are often over within a short while.

In 85 C. J. S. 146, §812, the author states that "as a general rule, under the statutes a tax sale must be made on the basis of a payment in cash, and the officer making the sale cannot give credit to the purchaser or accept his note." In 3 Cooley on Taxation, 4th Ed., 2820, §1423, it is stated that tax sales "must be made at auction, for cash, and with opportunity to all to compete in the bidding." In 51 Am. Jur. 914, §1048, it is stated that "in the absence of statutory authority to the contrary, a tax sale must be for cash. Extension of credit by the officer conducting the same or by the tax collector as to all or a portion of the purchaser's bid, when not authorized by statute, renders the sale invalid."

Under the above authorities it is clear that, in the absence of a statute providing otherwise, bids made at tax deed sales, under §194.21, F. S., must be cash bids, the purchaser being required to *forthwith* pay to the clerk of the circuit court, or his deputy, making the tax deed sale the amount of the bid in cash or its equivalent. If the bid accepted by the clerk is not paid within a reasonable time the clerk should, upon the failure of the bidder to *forthwith* pay the amount of his bid, re-offer the lands for sale for cash.

063-66—June 17, 1963

CRIMINAL PROCEDURE

REGISTRATION OF PERSONS PREVIOUSLY CONVICTED OF A FELONY—METHOD—§775.13, F. S.

To: Don McLeod, Director, Florida Sheriffs Bureau, Tallahassee
QUESTION:

Under §775.13, F. S., can a person previously convicted of a felony register with the Florida Sheriffs Bureau by sending the information through the mail, or must he appear in person at Bureau headquarters in Tallahassee for such registration?

Section 775.13, F. S., relates to and requires the registration of persons previously convicted of felonies. It provides that such a person shall register with the sheriff within 48 hours after entering any county of this state. However, it permits registration with the Florida sheriffs bureau and says: "Any person so registering with the Florida sheriffs' bureau shall not be required to make further registration in any county in the state."

The same standard of registration is prescribed by the statute irrespective of whether the registration is with the county sheriff or

the sheriffs bureau. This is indicated by the requirement of subsection (4) of said statute that registration with the bureau "shall be subject to the same terms and conditions as required for registration with the several sheriffs of the state." It follows that there would be no legal objection if the bureau were to authorize the several sheriffs to register such persons in behalf of the bureau and transmit the registration papers to the bureau, and for any sheriff to proceed in accordance with such authorization, assuming that this is mutually agreeable to the bureau and the particular sheriff. The manner in which registrations with the bureau are accomplished lies largely in the discretion of the bureau and it hardly seems to be a departure from the law or an abuse of discretion if a sheriff acts for the bureau under its authorization, inasmuch as the sheriff himself is required by law to accept registrations.

In every instance, the registrant must be fingerprinted and photographed and must list the crime of which he was convicted, the place of conviction, the sentence imposed, if any, his name, his aliases, if any, and his address and occupation.

If a person should wish to register with the bureau without appearing at its office in Tallahassee, I think that, upon the authorization of the bureau, it would be permissible and lawful for any sheriff of this state, or any of his deputies, when requested to do so by such person for the purpose of assisting him to register with the bureau, to take the photograph and fingerprints of such person, fill out and have him execute a criminal registration form containing the data required by the statute (the kind of form commonly used by Florida sheriffs for registering such persons), type "*BUREAU REGISTRATION*" at the top of such form, and for such sheriff or deputy sheriff to then mail the original white copy of the form, together with the photograph and fingerprints, to the bureau. Upon receipt of these items, the bureau may accept them as a registration with the bureau under the statute.

The procedure suggested above would result in the bureau being furnished properly filled out and executed registration forms and authentic, accurate photographs and fingerprints of persons wishing to register with it without appearing at its office.

063-67—June 18, 1963

CONSERVATION

DIVISION OF BEACHES AND SHORES; JURISDICTION, BOARD OF CONSERVATION, TRUSTEES OF INTERNAL IMPROVEMENT FUND—CH. 63-40, LAWS OF FLORIDA, §§370.01 (16) (17), 370.02(2) (f), (9), 253.65, F. S.

To: *Van H. Ferguson, Director, Trustees of the Internal Improvement Fund, Tallahassee*

QUESTION:

What is the effect of Ch. 63-40, Laws of Florida, (S. B. 343), creating the division of beaches and shores in the board of conservation, upon the duties of the trustees of the internal improvement fund, with reference to processing of applications for permits for the installation of piers, docks, wharves and similar structures?

I have reviewed Ch. 63-40, Laws of Florida, which became law on May 14, 1963, and find that it amends Ch. 370, F. S., which chapter

establishes the several divisions of the department of conservation. Section 370.01, F. S., has reference to "definitions" and the subject new legislation amends this section of the statute by adding subsections (16) and (17), which are quoted as follows:

(16) "Beaches and shores" shall mean the coastal and intracoastal shoreline of this state bordering upon the waters of the Atlantic Ocean, the Gulf of Mexico, the Straits of Florida, and any part thereof, and any other bodies of water under the jurisdiction of the state of Florida, between the mean high water line and as far as may be necessary to effectively carry out the purposes of this act.

(17) "Erosion control, beach preservation and hurricane protection" shall include any activity, work, program, project or other thing deemed necessary by the state board of conservation to effectively preserve, protect, restore, rehabilitate, stabilize and improve the beaches and shores of this state, as defined above.

Section 2 of the act amends §370.02(2), F. S., by adding a new subsection (f) creating the division of "Beaches and shores."

Section 370.02, F. S., is further amended by adding a new subsection (9), defining the general authority and responsibility which is vested in the division of beaches and shores of the board of conservation with respect to the preservation, conservation and restoration of beaches and shores, including the control of beach erosion and the protection against hurricane and storm damage.

Chapter 63-40, which would be incorporated in Ch. 370, F. S., as set forth in the terms of the act as an amendment to this chapter, does not repeal §253.65, F. S., which has been the authority under which the trustees have administered all matters relating to protection and restoration of erosion along the beaches of the state. Even though this new legislation does not repeal the existing statutory provision as to erosion control authority heretofore granted to the trustees, it is my view that this new legislation represents the most recent expression of the legislative intent with respect to the state agency which should be authorized to administer all activities relating to protection and restoration of beaches and shores and, therefore, all future projects which relate to this field of endeavor should be under the supervision and control of the beaches and shores division of the board of conservation, as outlined in subject legislation.

The language used in the new legislation appears to limit the responsibility of the board of conservation to matters which relate to preservation, conservation and restoration of beaches and shores and it would therefore be my conclusion that this would limit the authority of the division of beaches and shores to such coastal structures as could reasonably be related to projects designed to preserve, conserve and restore the beaches and shores of the state. Such structures would include, but might not be limited to, jetties, groins, breakwaters and sea-walls.

On the basis of the interpretation of Ch. 63-40, as herein set forth, it would follow that the processing of permits for installation of piers, docks, wharves and similar structures which have no relationship to the preservation, conservation or restoration of beaches and shores would continue under the authority and jurisdiction of the staff of the trustees of the internal improvement fund.

I trust the above will answer satisfactorily the questions raised in your memorandum.

063-68—June 21, 1963

TAXATION

OCCUPATIONAL LICENSE TAXES, HOME-A-RAMA OPERATORS AND THEIR TENANTS—§§205.01, 205.29, 205.58, 205.59, 205.68, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Are operators of Home-A-Rama establishments, as hereinafter defined, subject to occupational license taxes?

2. Are lessees of stalls or compartments in such Home-A-Rama establishments subject to occupational license taxes when:

(a) They makes sales of goods from the said stalls or compartments in the Home-A-Rama establishment?

(b) They take orders, to be approved and delivered from the lessee's principal place of business located elsewhere?

(c) They take no orders, make no sales nor make any deliveries from such stalls or compartments?

The "Home-A-Rama" referred to in the above questions consists of a building or other facility leased or owned by the operator of the said Home-A-Rama, which is divided into stalls or compartments designed for use in exhibiting and displaying goods, wares, merchandise, and other tangible personal property, by the lessees of such stalls or compartments. It appears from the file before us that the owner or operator's only income from the Home-A-Rama is the rental received from the lessees of the stalls and compartments in the Home-A-Rama. We are advised that some lessees may use their stalls or compartments for displaying their goods, wares, merchandise or other tangible personal property to the buying public, but make no effort to make sales of the same; other lessees take orders for the sale and purchase of such property, such orders not being effective unless and until accepted at the lessee's principal place of business; other lessees take orders and accept the same at the stall or compartment leased by them, the merchandise purchased to be delivered later; and other lessees sell and deliver property from their stalls or compartments, the transaction being made and completed at the leased stalls or compartments.

Section 205.01, F. S., provides that "no person shall engage in or manage any business, profession or occupation, for which an occupational license tax is required by this chapter or other law of this state, unless a state license, or a state and county license, or a county license, as the case may be shall have been procured from the tax collector of the county where the place of business may be engaged in. . . ." The term "person" includes persons, firms, partnerships, corporations, associations, personal representatives and other legal entities (§205.68, F. S.). It is noted that the above statute uses the words business, profession or occupation; "these words are more cumulative than distinctive, and appear to all be comprehended in the word 'business.'" (Texas Co. v. Amos, 77 Fla. 327, 81 So. 471, text 472). "Business" is a word of large significance, and denotes the employment or occupation in which a person is engaged to procure a living. *Goddard v. Chaffee*, 2 Allen (Mass) 395, 79 Am. Dec. 796." (Texas Co. v. Amos, supra; *Harper v. England*, 124 Fla. 296, 168 So. 403, text 406). "Taxes im-

posed on businesses, occupations, or trades ordinarily intend activities carried on for profit or livelihood, but do not extend to single acts or a number of isolated acts." (53 C. J. S. 556, §27).

Home-A-Rama establishments, as above defined, amount merely to a leasing of his property by an owner or lessee of real estate. Although we find statutes imposing a license tax on the business of operating boarding houses, lodging houses, tourists camps, auto courts, etc. (§205.29, F. S.), we find no statute imposing a license tax on owners or lessees of dwellings and other buildings who lease their property to others. Whether subject to rental taxes, we are not here concerned; and deal here only with occupational license taxes. This answers question 1 in the negative; however, not considering any 1963 legislation dealing with occupational licenses and license taxes.

The lessees of the stalls and compartments, which are used by them for display purposes, appear to be engaged in the business of trading, bartering, buying, lending or selling tangible personal property at their principal places of business and are doubtless subject to license taxes under §205.58, F. S., as to their principal places of business. They are also liable for license taxes imposed by said §205.58, F. S., if tangible personal property is sold, traded in, bartered, bought, loaned, or otherwise disposed of at said stalls or compartments. Where goods are sold from the stalls or compartments in the Home-A-Rama, that is where an offer to purchase and its acceptance is completed at such stalls or compartments and the goods delivered by the seller to the purchaser, license taxes are due under said §205.58, F. S.

"An offer to buy or sell becomes a binding contract of sale when, and only when, the person to whom the offer is made properly accepts it." (77 C. J. S. 638, §28). An acceptance of an offer to buy or sell effects a complete contract of sale when, and only when, it is identical with the terms of the offer and unconditional. (77 C. J. S. 645 §29). "The place where a contract is made, within the meaning of the rule that the law of the place governs, is the place where the last act necessary to complete the contract of sale is performed, or the place where the transaction is finally consummated by acceptance and delivery." (77 C. J. S. 591, §6). Where goods and merchandise are only displayed and no orders or sales are made or taken, there is no doing business within the purview of §205.58, F. S. Where orders for goods and merchandise are taken by someone at the stall or compartment of an owner or lessee, other than the owner or lessee himself, not to be effective until approved by the owner or lessee, the place of acceptance by the said owner or lessee will determine the place of sale.

Employees or agents of the owner or lessee of a stall or compartment in the Home-A-Rama, taking orders for the sale of merchandise by the owner or lessee, which orders must be accepted or rejected by such owner or lessee, would not be brokers within the purview of §205.59, F. S., and would not be liable as such under said section. A broker is distinguished from an agent, in that a broker holds himself out for employment by others, and acts as an intermediate negotiator between the parties to a transaction, and in a sense is the agent of both parties, whereas the element of exclusiveness of representation of the principal by which he is employed enters into the employment of an agent (12 C. J. S. 8, §3). See also *Dorsett v. Overstreet*, 154 Fla. 566, 18 So. 2d 759, and definitions of "broker" in 5 Words and Phrases, Perm. Ed. Persons taking orders for their principal are not brokers within the purview of §205.59, F. S.

Question 1 is answered in the negative; the first part of question 2, designated as (a), is answered in the affirmative; the second part,

(b), is answered in the negative, except in those cases where approved at the stall or compartment; the third part, (c) is answered in the negative.

063-69—June 24, 1963

ELECTIONS

ACTIVITIES PROHIBITED BY PUBLIC SCHOOL EMPLOYEES—§104.31, F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee*

QUESTION:

To what extent are public school employees restricted from participating in political assemblies and activities?
Section 104.31, F. S., provides, in part:

(1) No officer or employee of the state, or of any county or municipality thereof, except as hereinafter exempted from provisions hereof, shall

(a) Use his *official authority or influence for the purpose of interfering with an election, or a nomination for office, or affecting the result thereof, or*

(b) Directly or indirectly coerce or attempt to coerce, command or advise any other officer or employee to pay, lend or contribute any part of his salary or anything else of value to any party, committee, organization, agency or person for political purposes, or

(c) Directly or indirectly coerce or attempt to coerce, command and advise any such officer or employee as to where he might purchase commodities or to interfere in any other way with the personal right of said officer or employee. The provisions of this section shall not be construed so as to prevent any person from becoming a candidate for and actively campaigning for any elective office in this state. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. (Emphasis supplied.)

Section 104.31, F. S., applies to teachers in public schools and colleges as well as to other public employees. The act appears to be clear as to its intent, its *primary purpose* being to prohibit public employees from using their official position or authority to influence the outcome of an election. I believe the key words used in the act indicating its intent are: "interfering with," "affecting the result," "coerce," "command," "advise," etc.

The act recognizes that public employees are in a position to coerce or influence subordinate employees or others as to how they vote and attempts to regulate their political activities in the manner prescribed. However, the right of a public employee, teacher or otherwise, to publicly or privately express his personal opinions as to candidates or political causes is not circumscribed.

In AGO 056-90 we stated that under the act a teacher could campaign for his own election but not for another.

In *State v. Stuler*, 122 So. 2d 1 (1960), the Florida supreme court ruled that an information charging that defendant while a state employee, *advised* other state employees to contribute to the campaign fund of a political candidate charged an offense even though the in-

formation did not charge that defendant had commanded or coerced employees to contribute.

Analogously, we believe §104.31(1)(a) precludes actual campaigning by a nonexempt public officer or employee for a candidate or cause in an election. It is a matter of common knowledge that persons holding public positions are thereby often enabled to wield considerable influence in an election. Whether successful or not, where a public employee campaigns for a candidate his *purpose* is to affect the result. Admittedly, it may be difficult in certain instances to distinguish between expressions of opinions and actual campaigning. Nevertheless, the facts of each situation can be examined to determine if the activity of the public officer or employee extended beyond expression of opinion to actual campaigning. It is our opinion that when a public officer or employee undertakes active solicitation for a candidate or otherwise engages in activities usually associated with campaign work his purpose is to affect the result of an election. As in the case of "advising" a fellow employee to contribute funds to a campaign, we do not believe the element of compulsion or coercion is required to constitute a violation. In support of our position that subsection (1)(a) applies to campaigning, attention is called to the fact that in exempting certain public officers from its operation, the act provides their "*political activity*" shall not be limited in elections.

Public employees have a constitutional right to attend public assemblies and political meetings, provided they limit their activities in such assemblies and meetings to the expression of their opinions on political subjects and candidates and do not use their right to attend and participate in such assemblies or meetings as a means or cover to solicit votes for candidates other than themselves, to organize for the promotion of candidacies of others or to campaign for others, or to coerce or unduly influence other employees or persons contrary to the meaning and purpose of the act.

It is noted that the legislature in 1959 deleted the prohibition in the act as originally enacted against public officers and employees holding party offices or membership on any county or state executive committee except those under the merit system. It follows that where public officers and employees hold party offices they may perform all functions reasonably necessary to the discharge of such offices, but without violating the provisions of the act which are designed to protect others from coercion, threats, intimidation or other improper or corrupt practices in the elective process. This would appear to authorize them as party officers to participate in party organizations for the promotion of the candidacies of the party's candidates, and to help conduct party campaigns in all of their legitimate phases, including the solicitation of party campaign funds.

As to advising others to contribute funds for a political purpose, it is my opinion that public employees should rigidly and literally comply with the provisions of §104.31(1)(b), F. S., forbidding such advice to other public employees or officers.

The governing board or agency employing the teachers or other public employees may in the exercise of its discretion place additional restrictions as a condition of employment upon its employees provided such conditions are reasonable (see *Jones v. Board of Control of Florida*, 131 So. 2d 713).

Your question is answered as best it can be by the foregoing comments.

063-71—June 28, 1963

CRIMINAL PROCEDURE

ARRESTS MADE FOR VIOLATIONS OF §509.141, F. S.— EJECTION OF UNDESIRABLE GUESTS, PROCEDURE, ETC.—CH. 63-96, LAWS OF FLORIDA

To: H. A. Geiger, Chief Deputy, Sheriff's Office, Ocala

QUESTIONS:

1. Is an officer authorized to physically remove a person from restaurant premises, without arresting him, when called upon to eject such person by the management or an employee pursuant to §509.141, F. S.?

2. Is an officer authorized to arrest a person so ejected by him from restaurant premises?

3. Has any court decision ruled said §509.141, F. S., to be unconstitutional?

AS TO QUESTION 1:

Concerning question 1, §509.141(1), F. S., gives to the manager, assistant manager or other person in charge of any restaurant "the right to remove, cause to be removed, or eject from such . . . restaurant, . . ." any guest of such establishment for various enumerated reasons, including intoxication, profane or lewd language, conduct tending to disturb the peace and comfort of other guests, "or who, in the opinion of the management, is a person whom it would be detrimental to such . . . restaurant, . . . for it any longer to entertain." Subsection (2) of this statute provides the manner in which such ejection must occur, requiring first an oral or written notification to the guest that the establishment no longer desires to entertain him, and requesting that he immediately depart. Subsection (3) provides that "any guest who shall remain or attempt to remain in such . . . restaurant, . . . shall be guilty of a misdemeanor, and shall be deemed to be illegally upon such . . . restaurant . . . premises."

Question 1 concerns primarily §509.141(4) F. S., as it read before it was amended by Ch. 63-96, which became effective as law on May 20, 1963. Said subsection formerly authorized sheriffs, deputy sheriffs and other law enforcement officers to eject an undesirable guest or other person illegally upon restaurant premises upon the request of the management. However, subsection (4) as amended by Ch. 63-96 contains no such authorization; rather, it provides as follows:

(4) *In case any such guest, or former guest, of such public lodging or public food service establishment, as above defined in subsections (1), (2) and (3), or any other person, shall be illegally upon any such public lodging or public food service establishment premises, the management or any employee of such public lodging or public food service establishment may call to its assistance any policeman, constable, deputy sheriff, sheriff, or other law enforcement officer of this state, and it shall be the duty of each member of the aforesaid classes of officers, upon request of such public lodging or public food service establishment's management or employee to place under arrest and take into custody for violation of this section any such guest, where any such guest commits the misdemeanor set forth in subsection (3) above in the presence of said officer, or, in the event a warrant has*

been issued by the proper judicial officer for the arrest of any such guest, the officer shall serve said warrant and arrest and take such person into custody. . . . (Emphasis supplied.)

Concluding, it is my opinion that under the provisions of §509.141, F. S., as amended, a law enforcement officer is not authorized to physically remove a person from the premises of a restaurant unless he does so as an incident to a lawful arrest of such person. We hold that an arrest can be made by a law officer only when all the elements required by the statute are found to exist. That is, a request to leave by the management is first made and a refusal ensues. These elements constitute the basis for probable cause that the offense has been committed, authorizing an arrest under the amended statute. Question 1 is therefore answered in the negative.

AS TO QUESTION 2:

Question 2 is answered by the answer to question one, i.e., removal by an officer of a person can occur only as an incident to an arrest.

AS TO QUESTION 3:

The constitutionality of §509.141, F. S., in its form prior to the 1963 amendment of subsection (4) thereof, was challenged in the case of *Robinson v. State*, 144 So. 2d 811. The supreme court of Florida held the statute reflected a valid exercise of the legislative powers of this state, and therefore, was constitutional. A petition for writ of certiorari was filed in the U. S. supreme court seeking a review of said holding of the supreme court of Florida. On June 10, 1963, the U. S. supreme court noted probable jurisdiction, and it has set the case for argument in October. Thus, the constitutionality of the act will be finally concluded by the U. S. supreme court probably the latter part of this year.

In conclusion, the answer to question 1, under the provisions of §509.141, F. S., as amended, would be in the negative. The above discussion of questions 2 and 3 answer them as specifically as possible.

Your attention is respectfully directed to AGO 059-195, copy of which is attached hereto, under which this office concluded to the contrary prior to the 1963 amendment to the statute. In light of the amendment to the statute, AGO 095-195 is no longer applicable.

063-72—July 8, 1963

TRAVEL EXPENSES

ASSISTANT STATE ATTORNEYS—CONSTRUCTION OF §112.061, F. S., AS AMENDED BY CH. 63-400, LAWS OF FLORIDA

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Is an assistant state attorney, whether commissioned or not, classified as an officer or public officer insofar as the provisions of §112.061, F. S., as amended by Ch. 63-400 are concerned?

2. Does the fact that an official is appointed by the governor, without the issuance of a commission, entitle him to travel expense reimbursement as an officer or public officer under the provisions of §112.061, F. S., as amended by Ch. 63-400?

Under §112.061(2), F. S., as amended by Ch. 63-400, the terms

"officer or public officer," "employee or public employee," and "authorized person," as used in said section as amended, are defined in paragraphs (c), (d) and (e) of said subsection (2) as follows:

(c) Officer or public officer—an individual who in the performance of his official duties is vested by law with sovereign powers of government and who is either (1) elected by the people, or (2) commissioned by the governor *and has jurisdiction extending through the state*, or (3) any person lawfully serving instead of either of the foregoing two classes of individuals as initial designee or successor. (Emphasis supplied.)

Generally "a position is a public office when it is created by law, with duties cast on the incumbent that involve some portion of the sovereign power and in the performance of which the public is concerned, and that are also continuing in their nature and not occasional or intermittent. A public employment, on the other hand, is a position in the public service that lacks sufficient of the foregoing elements or characteristics to make it an office: (26 Fla. Jur. 172, §10; see also *State v. Hocker*, 39 Fla. 477, 22 So. 721, text 722; *State v. Jones*, 79 Fla. 56, 84 So. 84, text 85; *Advisory Opinion*, 153 Fla. 650, 15 So. 2d 765, text 766; *Glendinning v. Curry*, 153 Fla. 398, 14 So. 2d 794, text 799; *State v. Hulbert*, 155 Fla. 531, 20 So. 2d 693, text 694).

"When a statute contains a definition of a word or phrase, that meaning must be ascribed to the word or phrase whenever repeated in the same statute unless a contrary intent clearly appears" (*Richard Bertram & Co. v. Green*, Fla. App. 132 So. 2d 24, text 26; *Vocelle v. Knight Bros. Paper Co.*, Fla. App. 118 So. 2d 664, text 667). "A statutory definition of a word is controlling and will be followed by the courts." (*Ervin v. Capital Weekly Post*, Fla., 97 So. 2d 464, text 469; see also *Greenleaf & Crosby Co. v. Coleman*, 117 Fla. 723, 158 So. 421, text 427; *First Nat'l Bank v. Florida Indus. Com.*, 154 Fla. 74, 16 So. 2d 636). See also 82 C. J. S. 536, et seq., §315; 50 Am. Jur. 253-254, §261; 30 Fla. Jur. 190, §89. Under these authorities a statutory definition of a word or phrase used in a statute takes precedence and controls over all other definitions. It, therefore, appears that the above definitions of "officer," "public officer," "employee," "public employee," and "authorized person," control and must be followed whenever the said words are used in §112.061, F. S., as amended by Ch. 63-400.

The preamble to said Ch. 63-400 states that "it is the intent of the legislature that unless specifically exempt under the provisions of this act as herein provided, all public officers, employees and authorized persons in the state when traveling on official business shall be reimbursed from public funds for their traveling expenses within the limitations and maximum rates prescribed in this act," which includes §112.061, F. S., as amended by said Ch. 63-400.

In the light of the above and foregoing we construe §112.061 (2)(c), F. S., as amended, as applying to three groups of persons: (1) Elected public officials, (2) officers appointed and commissioned by the governor, who have a "jurisdiction extending throughout the state," and (3) persons *lawfully serving instead of* either of the foregoing classes of individuals as initial designee or successor. The reference to elected public officers seems clear and needs no discussion. The reference to officers appointed and commissioned by the governor, who have a "jurisdiction extending throughout the state," present the question of the meaning of the phrase "jurisdiction extending throughout the state." Persons serving instead of such officers doubtless in-

clude those persons appointed to serve during suspensions by the governor under §15, Art. IV, State Const. We come now to the meaning of the above phrases "jurisdiction extending throughout the state," and "lawfully serving instead of."

Jurisdiction extending throughout the state seems to be dependent upon the construction of the word "throughout," or "throughout the state." Webster's dictionary defines the word "throughout" as "in every part; from one end to the other; everywhere; from beginning to end." In *Thomas v. Austin*, 103 Ga. 701, 30 S. E. 627, the court held that a statute capable of being applied to any county in the state was applicable throughout the state, however, stating that it is not necessary that every county in the state, at the time of its enactment, should fall within its operation, provided that the act may reasonably be expected to become applicable to every county in time. See also, to the same effect, *Abbot v. Com.*, 160 Ga. 657, 129 S. E. 38, text 41. In *City of South Bend v. Blue Lines*, 219 Ind. 462, 38 N. E. 2d 573, text 575 and 576, it was held that a contract to perform certain functions throughout a municipality was applicable to an extension of the corporate limits after the making of the said contract. In *State v. Daniel*, 87 Fla. 270, 99 So. 804, text 809, the court said, concerning Ch. 9274, 1923, applicable to all counties of the state having a population of more than 100,000 according to the last preceding federal census, that "uniformity of operation throughout the states does not require universality of operation throughout the state." The term "in lieu thereof" has been said to be synonymous with the phrase "instead of." (42 C. J. S. 478, note 6).

The phrase *lawfully serving instead of* an elected or an appointed officer, as used in §112.061, F. S., as amended, seems to be a serving in lieu of such an officer, in the place of such an officer or instead of such an officer. (*Irwin v. McDowell*, Cal., 34 P. 708, text 709; *Burpee v. Logan*, 216 Ga. 434, 117 S. E. 2d, 339, text 342; *Cruikshank v. Cruikshank*, 39 Misc. 401, 80 N. Y. S. 8, text 12; *Holt Mfg. Co. v. Brotherton*, 91 Wash. 354, 157 P. 849, text 850, *Milan Mfg. Co. v. Donnelly*, Tex. Civ. App., 57 S. W. 2d, 345 text 347). In 42 C. J. S. 477, the term "in lieu" or "in lieu thereof" is defined as "in place of; instead of; in substitution for. The term implies the existence of something for which a substitution is being made. . . ." In substance we have a substitute officer. "An 'agent' is one who acts for or in the place of another by authority from him; one who undertakes to transact some business or manage some affairs for another by authority and on account of the latter. . . . He is a substitute, a deputy, appointed by the principal, with power to do things which the principal may or can do."

Under §7, Art. VIII, State Const., "all county officers, except assistant assessors of taxes, shall, before entering upon the duties of their respective offices, be commissioned by the Governor. . . ." We find no general constitutional provision requiring the commissioning of state officials like or similar to the above requirement as to county officers. "A commission is not an appointment but is evidence of an appointment. While the appointment of an officer is usually evidenced by a commission, as a general rule it is not essential to the validity of an appointment that a commission issue. . . ." 67 (C. J. S. 189, §36), unless made so by constitutional or statutory requirement. Under the statutes (§§27.21, 27.22, 27.29, 27.30 and 27.31, F. S.) assistant state attorneys for all circuits, except the 11th and 13th judicial circuits, are appointed by the governor. Assistant state attorneys in said 11th and 13th circuits are appointed by the state

attorneys of said circuits (§§9B and 9C, Art. V, State Const.) Neither the statutes nor the constitutional provisions expressly require the commissioning of the assistant state attorneys. Chapter 113, F. S., seems to contemplate the issuance of commissions by the governor as to the appointments made by him. To make a distinction between assistant state attorneys appointed by the governor and the assistants appointed by the state attorneys in the 11th and 13th judicial circuits would raise material constitutional questions. The fact that assistant state attorneys in the 11th and 13th judicial circuits are not appointed or commissioned by the governor should not be held to make any difference between them and other assistant state attorneys, as to their rights under §112.061, F. S.

Sections 27.14 and 27.15, F. S., make provision for the assignment, by the governor, of state attorneys of one circuit to services in another circuit or circuits; however, we find no statute expressly providing for the assignment of assistant state attorneys to services outside of their judicial circuit. We have been unable to find any constitutional or statutory provision in this state providing for the assignment of a county solicitor of one county to services in another county. However, in Advisory Opinion, 152, Fla. 119, 10 So. 2d 926, the justices advised the governor that he may, under §6, Art. IV, of State Const., requiring that he take care that the laws of the state be faithfully executed, assign a county solicitor of one county to service in another county when otherwise a miscarriage of justice may result or a criminal go without being tried. Under these circumstances, in the light of authorities above cited, relating to the meaning of *jurisdiction extending throughout the state*, above-mentioned, we reach the conclusion that state attorneys have a jurisdiction extending throughout the state, within the contemplation of §112.061(2), F. S.

Assistant state attorneys appear to be statutory state officers, appointed for a particular circuit, but not prohibited by a statute or constitutional provision from being assigned by the governor under circumstances to service in other circuits, when such an assignment is deemed necessary by the governor to prevent a miscarriage of justice or to prevent a criminal from going free without trial.

Question 1 is answered in the affirmative. The fact that assistant state attorneys may be appointed without the issuance of a commission, will not take them out of the operation of §112.061(2), F. S., as amended, they having the same powers and duties as other assistant state attorneys appointed by the governor. As to assistant state attorneys, question 2 is answered in the affirmative. Although we feel that the same rule will be applicable to most officers who are not commissioned, we would prefer to limit our answer here to the assistant state attorneys.

063-73—July 8, 1963

TAXATION

EXEMPTIONS—CONSTRUCTION OF §192.62(2)(c), F. S., 192.06(1) AND (2), F. S.; CH. 61-266, LAWS OF FLORIDA

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What properties are entitled to tax exemption under the latter part of §192.62(2)(c), F. S., referring to property which "prior to June 16, 1961," was leased for

a valuable consideration for purposes not otherwise exempt under §192.62, F. S.?

The supreme court of Florida, in *Park-N-Shop, Inc. v. Sparkman*, Fla., 99 So. 2d, 571, text 573, held that the property of the state and its counties "is immune from taxation . . . despite the references to such property in §192.06 (1) and (2), supra, as being exempt." This holding was followed by the supreme court in *Patrick Gardens, Inc. v. Nash*, Fla., 100 So. 2d 626. In these cases it was also held that the statutes and laws of the state, as of that time, made no provision for the taxation of leasehold and other interests in state or county owned realty, held under grant from the state or a county. The legislature by §192.62, F. S., enacted as Ch. 61-266 subsequent to the above court decisions, provided that "any real or personal property which for any reason is exempt or immune from taxation but is being used, occupied, owned, controlled or possessed, directly or indirectly by a person, firm, corporation, partnership or other organization in connection with a profit making venture, whether such use, occupation, ownership, control or possession is by lease, loan, contract of sale, option to purchase or in any wise made available to or used by such person, firm, corporation, partnership, or organization, shall be assessed and taxed to the same extent and in the same manner as other real or personal property."

Said §192.62, F. S., exempts from the operation of the above taxing provision when the property is used for several stated purposes; one of these exemptions is when such "property prior to the effective date of this act (June 16, 1961) was leased for valuable consideration for purposes not otherwise exempt hereunder." In legal effect this provision is a tax exemption provision in the statute. Exemptions from taxation, whether granted in the constitution or in a statute, are to be construed against the exemption claimant and in favor of the taxing power, or the public in cases of doubt, in order to confine the exemption prescribed by the sovereign power. (31 Fla. Jur., 29 and 30, §142). In *Rast v. Hulvey*, 77 Fla. 75, 80 So. 750, text 753 and *Robinson v. Fix*, 113 Fla. 151, 151 So. 512, text 513, it was held that no property should be held to be within a tax exemption statute "unless it is clearly within the terms of the statute granting immunity from taxation." Numerous other Florida authorities are cited in the footnotes to 84 C. J. S. 437, §227, where it is stated, as a general rule, that "an alleged constitutional or statutory grant of exemption from taxation will be strictly construed in favor of the state (or county) and taxation and against the taxpayer and exemption."

The supreme court of Florida, in *Bancroft Inv. Corp. v. Jacksonville*, 157 Fla. 546, 27 So. 2d 162, text 171, remarked that it never considered questions of tax exemption "in isolation, but we lay the statute beside the facts and deduce what appears to be the rational result. If a court is not permitted to look through the letter of the statute and apply it to facts as they exist, then the legislative declaration of a falsehood may, in many cases, amount to the judicial declaration of a truth." This brings us to the determination of what was intended to be exempted under said §192.62(2)(c), F. S., when it provided for the tax exemption of property owned or used by the state, any county, municipality, or other public entity or authority, which was leased or otherwise made available to lessees, by the exempt owner, prior to June 16, 1961, for a "valuable consideration for purposes not otherwise exempt" under said §192.62, F. S. This provision seems to relate to those leases from the state, a county or other public entity, outstanding on June 16, 1961, and to no others.

This seems to relate to such lease contracts as they existed on said date and to no others. The exemption granted by this statutory provision terminates on the termination of such lease and may not be applied to subsequent leases. The exemption exists only so long as the original lease, in effect on June 16, 1961, exists, and has no application to leases made and entered into on or subsequent to said date.

It is stated in 51 C. J. S. 600, §57, that "an option for an extension or renewal (of a lease) in order to be effective, must be accepted or exercised; it has no force and is not binding on either party as an extension or renewal until this is done." (51 C. J. S. 600, §57). "An election or option to renew or extend a lease must, of course, be exercised to bring the renewal or extension into effect, and generally, where the tenant seasonably notifies the landlord of his desire to renew the lease, the landlord should execute and deliver to the tenant a new lease." (20 Fla. Jur. 395, §149-32 Am. Jur. 818, §975). In *Lee v. Quincy State Bank*, 127 Fla. 765, 173 So. 909, text 910, the supreme court of Florida said that "a renewal of a note involves a new contract by the maker and obligor. An extension of time for payment of a note requires assent on the part of the payee or holder of the note." See also 10 C. J. S. 758, §263.

We are, therefore, of the opinion that property embraced in §192.62(2)(c), F. S., as property which prior to the effective date of said section (June 16, 1961) had been, for a valuable consideration, leased from an exempt lessor to a lessee for purposes not otherwise exempt under said §192.62, F. S. This reference is to leases of such property made and entered into prior to said June 16, 1961, and has no reference to leases made subsequent to said date. Renewals of such leases are not leases entered into prior to said date and not within this provision. Nor are leases made prior to June 16, 1961, but extended subsequent to said date, within the said statutory provision.

063-74—July 8, 1963

TAXATION

SALES AND USE TAXES—PAYMENT—UNPAID CHECKS— PROCEDURE WHEN BAD CHECK GIVEN—§212.13(2), F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What steps should be taken by the collecting agency when a check given in connection with a sales or use tax is returned as a bad check?

"In the absence of an agreement to the contrary, the acceptance by a creditor of a check, whether it be a cashier's check, certified check, or the debtor's check, or the check of a third person, and the surrender of the evidence of the indebtedness and the giving of a receipt do not constitute payment per se." (*Cowen v. Indianapolis Life Ins. Co.*, 116 Fla. 814, 157 So. 180, text 182). To the same effect see also 70 C. J. S. 233, et seq., §24; 40 Am. Jur. 763-765, §72; 24 Fla. Jur. 532 and 533, §10.

The general rule is that where a check given as evidence of, or security for, a debt, and not as absolute payment thereof, the payee may, on nonpayment, proceed on the original obligation or consideration. (10 C. J. S. 1155, §526; 8 Am. Jur. 75 and 536, §§340 and 914). Therefore, upon the return of a check, given in connection with

a sales or use tax transaction, by the bank because of insufficient funds or otherwise, the collecting agency has the election of proceeding on the said check or of proceeding on the original debt or obligation, for example a sales or use tax, except where there has been an express agreement that the check was taken *in payment of the tax obligation* and not in the usual course of business. If the election is to proceed against the check, instead of against the original tax obligation, an action in court will be necessary; however, if the election is to proceed on the original obligation, including a sales or use tax obligation, a tax warrant may be issued in the usual way. The issuance of a tax warrant under such circumstances would appear to be an election to proceed on the original obligation or tax, instead of the check.

When the collecting agency of a sales or use tax elects to enforce the original obligation or tax, upon the return of a check given therefor for insufficient funds, and issues a tax warrant for the collection of such a tax, because of the above-mentioned election, no effort should be made to proceed against the check. When a tax warrant is issued under such circumstances the check may be returned to the maker thereof or, if his mailing address is unknown, destroyed after a reasonable period of time. Under §212.13(2), F. S., dealers are required to "secure, maintain and keep for a period of three years" their records of sales, etc. May we suggest that when bad checks have been in the hands of the collecting agency for a period of three years, that they may be disposed of and the said agency may elect.

063-75—July 15, 1963

SHERIFFS

FLAT FEE—SERVICE OF PROCESS—CH. 63-41, LAWS OF FLORIDA; §§30.23, 30.231, 47.48, F. S.

To: Bryan Willis, State Auditor, Tallahassee

QUESTION:

What is the sheriff's fee in connection with a service of process or the return and copy of non-execution of process?

Chapter 63-41, effective July 1, 1963, provides a flat fee of \$5 to be charged in civil cases for *each service of a summons or a writ*, except witness subpoenas and executions. The fee for the service of witness subpoenas shall be \$3.50 for each witness subpoenaed. The fees established by said chapter supplant the civil fees for service, mileage, copy and return, otherwise provided in §30.23 F. S.

Significantly, §1 of said chapter contains a proviso to the effect that fees now being collected in any county under special act shall not be affected by said chapter. Section 2 of said chapter provides that all fees collected under its provisions shall be paid in the fine and forfeiture fund of the county monthly.

The chapter is silent as to fees of the sheriff for return and copy of non-execution of process made pursuant to §47.48, F. S. Hence, the fee of the sheriff in connection with a return and copy of non-execution of process is as provided by §30.23 F. S., viz. 25¢ for the non-execution return and 25¢ for copy of process, and in proper cases where such copy exceeds 100 words, an additional 10¢ per 100 words.

I am of the opinion that the flat fee provided by §1, Ch. 63-41

is earned upon completion of the service of a summons or writ or a witness subpoena, as the case may be. In those counties where, because of applicable special acts, the sheriff operates his office on the fee system, it would appear that the proviso of §1 would make the flat fee authorized by said section inapplicable to the sheriff's fee for service of civil process in such counties. Since §30.23, F. S., has not been expressly repealed the fees provided for service of civil process in said section obtain in such counties.

063-76—July 15, 1963

TAXATION

NOTICE TO TAXPAYERS—SALES—WARRANTS—§§193.41, 193.45, 193.25, 193.34, 193.35, 193.51, 199.18, 200.27, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. When should notices to taxpayers, required by §193.45, F. S., be prepared and mailed?
2. What discounts under §193.41, F. S., should be allowed when tax rolls are not delivered to the tax collector until after Nov. 1 of the tax year?
3. When do ad valorem taxes against real and personal property become delinquent?
4. When should the delinquent real and personal property tax notices be published by the tax collector?
5. When should the tax collector issue warrants for the collection of delinquent personal property taxes?
6. When should the delinquent real property tax sale be held?

Real and personal (tangible and intangible) property taxes are assessed as of Jan. 1 of the tax year although the said property is not entered on the tax roll until after April 1 of the tax year. The descriptions of real and personal property are entered on the tax roll by the tax assessor beginning around April 1 of the tax year, together with his valuation of such property for purposes of taxation. "The county assessor of taxes shall complete the assessment rolls of the county on or before the first Monday in July," of the tax year, "on which day such assessor shall meet with the board of county commissioners . . . of their respective counties for the purpose . . . of perfecting, reviewing and equalizing the assessments; as made by the county assessor of taxes." This equalization hearing in some counties may require but a day or two while in other counties it might require a week or more, even in some cases requiring as much as a month. This will largely depend on the complaints filed by taxpayers. (See §193.25, F. S.).

When the tax roll is equalized by the board of county commissioners, it is returned to the assessor of taxes to enter the changes and corrections of valuations at the equalization hearing on the tax roll. After these changes and corrections have been entered on the tax rolls by the assessor of taxes, notice is sent to all taxpayers whose valuations have been changed at the equalization hearing who are permitted by statute to file complaints thereto at a meeting of the county commissioners to be held on the first Monday in August or September of the tax year. (§193.25, F. S.). After the equalization of the valuations of all taxable properties have been made and entered

on the tax rolls, millages to be levied on real and tangible personal properties are determined by the governing board of the taxing agency, and certified to the assessor taxes as provided by law. After the millages have been determined and certified to the assessor of taxes he begins the extension of the taxes on the tax roll. When this work is completed the tax roll is laid before the board of county commissioners for a final examination, correction and certification by them, after which the tax roll is certified to the collector of taxes for purposes of collecting the taxes so assessed (§§193.34 and 193.35, F. S.).

Although a tax roll may sometimes be completed and ready for delivery to the collector of taxes prior to Oct. 1, in most instances the tax rolls are not approved and certified to the tax collector until the first Monday in October, and probably in many instances not until Oct. 10 or 15. Sometimes the tax rolls are late reaching the county commissioners for purposes of equalization, and in some instances not until long after July 1 of the tax year, which in turn delays the time such rolls will reach the tax collector for collection purposes. The tax collector cannot begin the collection of taxes until the tax rolls are in his hands, this being true when tax rolls are late the beginning of tax collection may also be late.

Section 193.45, F. S., provides that the "tax collector, within fifteen days after delivery to him of the tax book . . . shall mail to each taxpayer appearing on the assessment roll, whose post office address is known to him, notice that the tax book is open for payment of taxes, stating the amount of taxes due by such taxpayer . . ." We find no express prohibition against the opening of the tax roll for the purpose of receiving tax payments prior to the sending out of the tax notices required by said §193.45, F. S. Notices to taxpayers, required by §193.45, F. S., should be prepared and mailed to the taxpayers as soon after the receipt of the tax roll as convenient. The tax roll may be opened for the receipt of tax payments even before the said tax notices are sent out. This answers the *first above question*.

Section 193.41, F. S., provides that "all taxes shall be due and payable on the first day of November of each and every year, or as soon thereafter as the assessment roll may come into the hands of the tax collector." (Emphasis supplied.) Said §193.41 recognizes that the tax rolls may not in all instances be ready for delivery to the tax collector by Nov. 1 of the tax year, but may in some instances be late. When the tax roll is in the hands of the tax collector on Nov. 1 of the tax year taxes become due on that day, but when the tax rolls come into his hands on a later date taxes are due on that date, this without regard to the notices required by said §193.45, F. S. However, in any cases where tax notices are processed in such a way that the tax roll is actually used in the collection of taxes instead of the tax warrant, then a different case might arise. Said §193.41 provides that discounts for early payment of taxes shall be "at the rate of four per cent in the month of November, three per cent in the month of December, two per cent in the following month of January, and one per cent in the following month of February, the taxes being payable in March without discount." Nowhere in the statutes do we find any provision making such discounts dependent on the periods of time from the delivery of the tax roll to the tax collector.

In some instances the tax rolls have come into the hands of the tax collector long after Nov. 1 of the tax year. In one instance, to our knowledge, the tax roll did not come into the hands of the tax collector until some 4 months late. In cases where the tax roll came into the hands of the tax collector long after Nov. 1 of the tax year it has usual-

ly been the policy of the public officers to permit a 4% discount for the first month after the tax rolls are delivered to the tax collector. However, it does not appear to have been the general practice to permit a 4% discount for the first 30 days after the tax rolls came into the hands of the tax collectors when the tax roll was only a few days late in being delivered to the tax collector.

Discounts of 4% should not be allowed beyond Dec. 1 except in exceptional cases and then only in those cases where the tax roll came into the hands of the tax collector too late for the taxes to be paid before the first of the following month under normal circumstances. The discounts are allowed during specified months, not for a certain number of days after the tax roll comes into the hands of the tax collector. Usually a 10 day delay in delivering a tax roll to the tax collector would not be such a delay as would prevent the tax collector processing tax payments by the first of the following month. Only in exceptional cases should the 4% discount be allowed after Nov. 30 of the tax year. Discounts for tax payments made beyond Nov. 30, by tax collectors, should be made only when authorized by the state comptroller. This answers the *second question*.

Unpaid taxes on real property (§193.51, F. S.), intangible personal property (§199.18, F. S.) and tangible personal property (§200.27, F. S.) become delinquent on the *first day of April* next after the tax year. This answers the *third question*.

Under §193.51, F. S., the tax collectors are required to, on or before June 1st of each year, advertise and sell in the manner provided by law, the delinquent real estate taxes in his county. The taxes become delinquent on April 1 following the tax year, after which date the tax collector begins the preparation of his delinquent tax roll which should be ready for advertisement of the delinquent tax sale by June 1 of the year following the tax year. Real estate delinquent tax rolls should be ready for publication as soon after April 1 as reasonably possible so that delinquent tax sales may be held around June 1. The delinquent intangible personal property tax roll should be published around April 15 following the tax year (§199.18, F. S.), and the delinquent tangible personal property tax roll also around April 15 following the tax year (§200.27, F. S.). These observations answer the *fourth question*.

Beginning May 1 the tax collector is required to issue tax warrants or executions for enforcing the collection of intangible and tangible personal property taxes (§§199.18(2) and 200.27, F. S.). As soon after May 1, following the tax year, the tax collectors of the several counties should, as soon as reasonably possible, issue tax warrants or executions, as provided in and by said §§199.18(2) and 200.27, F. S., and enforce such tax warrants or executions with all convenient speed. This answers the *fifth question*.

Section 193.51, F. S., requires that the tax collector "shall, on or before June first of each year," prepare and advertise his delinquent tax roll, thereby contemplating that the delinquent tax sale be held around the first of July following the tax year. When the tax roll is not delivered to the tax collector until long after Nov. 1 of the tax year there may be a delay in the date of holding the delinquent tax sale; however, such sale should in all cases be held with all convenient speed. Where, for instance, the tax roll is not delivered to the tax collector until May or June following the tax year there will of necessity be some delay in the holding of the delinquent tax sale. In all cases an effort should be made to hold the delinquent tax sale within the time provided by law; however, when the tax roll is late in

reaching the tax collector effort should be made to hold the tax sale as early as possible. *This answers the sixth question.*

We are advised that the tax roll in one county of Florida did not reach the tax collector, because of litigation or otherwise, until around July 1 of the year following the tax year. In such cases the tax roll should be opened for a period of 30 days, with a 4% discount for the first 30 days after the tax roll is delivered to the tax collector, and after the expiration of the said 30-day period the taxes should be deemed delinquent and preparations made for advertising the delinquent tax roll as soon as prepared and ready, and for the holding of the delinquent tax sale as soon as reasonably possible, allowing full time for the running of the delinquent tax notice of sale.

063-77—July 19, 1963

CRIMINAL PROCEDURE

PUBLIC DEFENDERS AND ASSISTANTS—OFFICE AND TRAVEL EXPENSE—PAYMENT—CHS. 63-409, 63-410, 63-400, 63-300, LAWS OF FLORIDA; §112.061, F. S.; §27, ART. III AND §4, ART. IX, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

From what funds should the office and travel expenses of public defenders and their assistant public defenders be paid?

Section 1, Ch. 63-409, provides that "there shall be a public defender . . . for each of the judicial circuits," of Florida who "shall be elected at the next general election by the qualified electors of their respective judicial circuits as other state officials are elected and shall serve for a term of four years." Interim appointments of such public defenders are to be made by the Governor of Florida to serve until the election and qualification of the regular public defenders. It is made the duty of the public defender to represent and defend indigent persons in his county charged with the commission of a felony. Under §4(1) of said Ch. 63-409, the "public defender may also hire assistant public defenders, investigators, secretaries and other clerical help as funds available may permit and as otherwise provided by law. Each of the counties of this state is empowered to expend moneys in furtherance of the provisions of this act." The public defenders, being appointed by the governor or elected by the people, within the purview of §27, Art. III, State Const., are state officers within the purview of said section of the State Const.

Chapter 63-410, provides a stated salary, payable from state general revenue funds, for each public defender and for certain assistant public defenders specifically mentioned in §1, Ch. 63-410. No question is raised concerning this appropriation of funds. Under §4 of Ch. 63-409, "each of the counties of this state is empowered to expend moneys in furtherance of the provisions of" Ch. 63-409. It is provided in and by said Ch. 63-409 that public defenders may "hire assistant public defenders, investigators, secretaries and other clerical help as funds available may permit and as otherwise provided by law." This authority to hire assistant public defenders of necessity depends upon the legislature making funds available for such purposes. It is also provided by said Ch. 63-409 that "all payments for the salary of the

public defender and the necessary expenses of his office, including salaries of his deputies, assistants and staff, shall be considered as being for a valid public purpose." This statute declares that the purposes therein mentioned are "for a valid public purpose," but makes no appropriation from the state treasury for the payment thereof.

Section 4, Art. IX, of the State Const., provides that "no money shall be drawn from the treasury except in pursuance of appropriations made by law." This language requires that such appropriations be made by an act of the legislature and not by a resolution of one or both houses (Advisory Opinion, 156 Fla. 48, 22 So. 2d 398, text 400; *Lainhart v. Catts*, 73 Fla. 735, 75 So. 47, text 54; Advisory Opinion, 43 Fla. 305, 31 So. 348, text 349). Appropriations have been defined as the setting apart of money formally and officially, out of public revenue or funds, for some special use or purpose, in such manner as the executive officers of the government will have authority to withdraw and use that money, and no more, for that object, and for no other. (Advisory Opinion, 43 Fla. 305, 31 So. 348, text 349; *Lainhart v. Catts*, 73 Fla. 735, 75 So. 47, text 48; *State v. Allen*, 83 Fla. 214, 91 So. 104, text 106; *Hires v. Mitchell*, 95 Fla. 345, 116 So. 81, text 87; *State v. Lee*, 121 Fla. 360, 163 So. 859, text 868, Advisory Opinion, 156 Fla. 48, 22 So. 2d 398, text 400).

In the light of the above authorities we find no statute or law appropriating funds from the state treasury for the payment of office and other expenses of public defenders and their assistants. It appears from said authorities that such expenses might be paid from county funds if and when made available in accordance with the applicable statutes and laws. This brings us to the question of payment of necessary travel expenses of public defenders and their assistant public defenders. In this connection, §5, Ch. 63-409, provides that "the salary and necessary travel expenses of the public defender as provided in §112.061, F. S., shall be paid from state funds as appropriated by the legislature." (Emphasis supplied.) This brings us to the question of whether or not there is an appropriation from which necessary travel expenses of public defenders and assistant public defenders may be paid.

Section 112.061, F. S., as amended by Ch. 63-400, regulates traveling expenses of public officers and employees traveling on state business, but is not within itself an appropriation for such purposes. Appropriations for state offices, boards, commission, etc., for the operation of such offices, boards, commission, etc., and the payment of their necessary expenses and obligations usually include funds for the payment of necessary travel expenses and the like. The supreme court, in Advisory Opinion, 74 Fla. 250, 77 So. 102, text 103; Advisory Opinion, 114 Fla. 520, 154 So. 154, text 156; *State v. Lee*, 140 Fla. 380, 191 So. 697, text 698; and Advisory Opinion, 145 Fla. 375, 199 So. 350, text 352, held that state officers, where a salary for them is fixed by statute, are entitled to payment of such salary from state funds, even when not included in the general appropriations bill.

Chapter 63-409, establishes the office of public defender in each of the several judicial circuits. Chapter 63-410, also appears to provide for the office of assistant public defender in several of the judicial circuits, but not in all such circuits. Public defenders appear to be public officers within the purview of §112.061(2)(c), F. S., as amended by Ch. 63-400, and entitled to per diem and traveling expenses under said §112.061, as amended, if there be an appropriation therefor. Item 720, of §2, Ch. 63-300, the same being the general appropriations act of 1963, provides a lump sum appropriation, from general revenue, for

the operation of the judicial department of Florida. Reference to the budget commission's report to the 1963 legislature, beginning on page 583 thereof, reveals the department's request for appropriations for the biennium of 1963-1965 in lump sums; \$3,357,100 for year beginning July 1, 1963, and \$3,367,100 for the year beginning July 1, 1964. The legislature made appropriations of \$3,900,600 for the year beginning July 1, 1963 and \$3,910,600 for the year beginning July 1, 1964, amounts somewhat in excess of the requests for appropriations. This increase of appropriation over the request may well have taken in mind the advent of the public defender into the judicial system of Florida.

The above-mentioned state budget commission report to the legislature requested that the sum of \$218,300 be provided for the year beginning July 1, 1963, and the sum of \$227,300 for the year beginning July 1, 1964 to cover the expenses of the judicial department. We must presume that the appropriation act intended not less than said sums to be used for expenses, and, due to the increase made by the legislature, said expenses may have also been increased.

We find nothing in applicable statutes and laws which may be construed as providing state funds to pay the office expenses of public defenders; if such funds are paid from public funds, such funds will have to be funds provided by the counties or otherwise other than state funds. However, we are of the opinion that the travel expenses of public defenders, and the assistants provided for in Ch. 63-410, who are paid from state funds, are within the purview of §112.061, F. S., as amended, and item 720, §2, Ch. 63-300, the general appropriations act.

063-78—July 19, 1963

MOTOR BOAT REGISTRATION

CONSTRUCTION OF CH. 63-550, LAWS OF FLORIDA, AMENDING LAW RELATIVE TO REGISTRATION, LICENSES AND LICENSE TAXES—CH. 371; §§371.021, 371.06, 371.061, 371.121, 192.03, F. S.

To: *W. Randolph Hodges, Director, Board of Conservation,
Tallahassee*

QUESTIONS:

1. Should licenses and license taxes issued under and pursuant to §371.121, F. S., repealed by §12, Ch. 63-550, prior to the effective date of said Ch. 63-550, be deemed sufficient without the obtaining of a license under said Ch. 63-550?
2. Does §7(2), Ch. 63-550, impose the license taxes therein set out on all boats whether propelled by mechanical means or not?
3. What is the effective date of said Ch. 63-550?

First question.—Part I, Ch. 371, F. S., relates to motor boat registration, §371.121 thereof providing the classification for licenses and the license taxes under said chapter. The fees or license taxes under said §371.121 differ materially from the schedule of fees and classification contained in Ch. 63-550. It should also be noted that §12 of said Ch. 63-550 repeals said §371.121, F. S., without specifically repealing any other section or part of said Ch. 371, F. S.; also said Ch. 63-550, contains no general repealer clause or similar provision.

Under §371.061, of said statutes, it is provided that the state board of conservation "shall fix a day and month of the year on which certificates due to expire during the calendar year shall lapse and no longer be of any force and effect unless renewed pursuant" to said Ch. 371, F. S. Section 370.06(5), F. S., fixes the license year for license taxes against noncommercial boats operated over the waters of Florida, as beginning on July 1 each year and ending on June 30 of the following year. This statutory provision appears to be applicable to boat licenses imposed under and by §371.121, F. S., and under and by §7, Ch. 63-550.

Chapter 63-550, and §371.121, F. S., each being a taxing and revenue statute or law, should each be construed in favor of the boat owner or licensee and against the taxing authority, that is, the state of Florida. (State v. Green, Fla. 101 So. 2d 805, text 808; Florida Nat'l Bank v. Simpson, Fla., 59 So. 2d 751, text 758; Overstreet v. Ty-Tan, Inc., Fla., 48 So. 2d 158, text 160; State v. Gay, Fla. 40 So. 2d 225, text 229; DeVore v. Gay, Fla. 39 So. 2d 796, text 797; and other Florida cases). This same rule has been applied to license tax statutes (State v. Selson, 155 Fla. 399, 20 So. 2d 394, text 395; Lee v. Smith, Richardson & Conroy, 141 Fla. 535, 191 So. 767, text 768).

Where licenses are obtained under §371.121, F. S., prior to the repeal of said section by §12, Ch. 63-550, and the effective date of said Ch. 63-550, such a tax will be a tax of the same nature and for a like purpose, although in a lesser amount. If another tax is to be required of the same person under Ch. 63-550, there will have been collected 2 license taxes for the same purpose; that is, for the operation of the same boat for the same purpose. The 2 taxes are not imposed by different agencies or branches of the government for different purposes, but by the same branch of the government for the same purpose or purposes. Chapter 63-550 does not appear to levy a special tax separate and apart from that imposed by §371.121, but to levy a tax in lieu of or in place of said §371.121. Said §371.121 is actually repealed by §12 of said Ch. 63-550.

"Although the federal constitution does not afford protection against double taxation by the state, and it is not expressly prohibited by the Florida constitution, it is generally agreed that tax statutes may be held unconstitutional where they result in double taxation" (30 Fla. Jur. 505, §76). "There is a presumption against double taxation, and any construction of a taxing statute which results in double taxation is to be avoided if possible." (84 C. J. S. 137, §41, 51 Am. Jur. 340, §286). This leads to the view that where a tax is paid under §371.121, F. S., for a period of time, no tax will be due under Ch. 63-550, for the same period of time. Boat owners in this state would seem to have the right to demand a license under §371.121 until Ch. 63-550 becomes effective, if not yet effective.

In the light of the above and foregoing, licenses and license taxes paid and issued under and pursuant to §371.121, F. S., prior to the effective date of Ch. 63-550, should be deemed sufficient without the obtaining of a license under said Ch. 63-550, where the license period for which payment was made extends beyond the effective date of said Ch. 63-550.

Second question.—Section 7(2), Ch. 63-550, imposes a license tax on all boats, as classified by said subsection in amounts ranging from \$1 for a boat under 12 ft. in length, to \$75 for a boat 110 ft. or more in length, plus additional service fees as provided in §7(4). This schedule of license taxes is preceded by the provisions that "boats and vessels shall be classified according to the following schedule and the

registration certificate tax shall be in the following amounts." (Emphasis supplied.) As defined in §3(8), of said Ch. 63-550, a "registration certificate tax" "means a state tax on boats and vessels and outboard motors capable of propelling any such boat or vessel . . ." In §3(1), the words "vessel" and "boat" are declared to be synonymous terms. The word "synonymous" is defined in Black's Law Dictionary as "expressing the same or nearly same idea." To the same effect, see also 40 Words and Phrases, Perm. Ed., p. 961; 11 C. J. S. 372, defining a boat; and 92 C. J. S. 999, defining a vessel.

Often the word "boat" is used to refer to the smaller water craft, usually without a deck, and the word "vessel" to the larger water craft, usually with a deck. Under this definition in §3(1), Ch. 63-550, we must conclude that boats and vessels, classified and taxed under §7 of said Ch. 63-550, are subject to the definition in said §3(1), of said Ch. 63-550, that is, they are vehicles (boats and vessels) that are propelled by a motor or other artificial means. Under §3(3), of Ch. 63-550, the term "owner" means a person having the property in or title to a motorboat (Emphasis supplied.) Under sub§(6) of said §3, the term "operate" means to navigate or otherwise use a boat or vessel *artificially propelled by a motor or sail.* (Emphasis supplied.) By reference to the title of said Ch. 63-550, we find that said act relates to a tax on boats and vessels and reclassified boats as power driven vehicles on the waterways of Florida. It is provided in §2 of said Ch. 63-550 that "all boats and vessels hereinafter described propelled in whole or in part by a motor or sail, either inboard or outboard, are hereby declared to be motor vehicles and shall be taxed and certified as motor vehicles," it appearing to have been the intention of the legislature that motorboats are motor vehicles within the purview of said Ch. 63-550.

The use of the term "Part 1" in §3, Ch. 63-550, is confusing until said §3 is compared to §371.021, F. S., and when compared we find that said §3 is in substance an amendment of said §371.021. Although said §371.021 was not repealed by Ch. 63-550, as was §371.121, by §12 of said Ch. 63-550, it is by implication an amendment of said §371.021.

From the above and foregoing we must hold that licenses and license taxes under said Ch. 63-550, are imposed on boats and vessels that are propelled by a motor or other mechanical means, and do not include vessels and boats propelled by *other than a motor or other mechanical means*. Section 3(2), of said Ch. 63-550 defines a "motorboat" as any "undocumented boat or vessel propelled or powered by machinery of more than ten horsepower and includes both the boat and the motor or motors which customarily propel the same whether inboard or outboard, whether or not such machinery is the principal source of propulsion. . ."

From the above and foregoing we conclude that the non-commercial boats listed in §7(2), Ch. 63-550, and on which license taxes are imposed under said Ch. 63-550, are those boats or vessels *propelled or powered by machinery (including outboard and inboard motors) of more than 10 horsepower*. The phrase "more than 10 horsepower" seems to exclude boats and vessels powered by a 10 horsepower motor, or less. Therefore, §7(2), Ch. 63-550, imposes the license taxes set out therein on only boats and vessels propelled or powered by motors and other machinery of more than 10 horsepower. Unless a boat or vessel is powered by a motor or machinery of more than 10 horsepower it is not liable for license taxes under §2 of Ch. 63-550.

Third question.—Chapter 63-550, provides in §12 thereof that "this act shall take effect July 1, 1963." Senate bill 380, now Ch. 63-550,

was adopted by the state legislature prior to its adjournment on June 19, 1963, and reached the governor's office on June 21, 1963, and became a law without the governor's approval on July 10, 1963, at the beginning of said day. Pursuant to specific statutory authority the governor by executive proclamation did on July 15, 1963, extend the period of time for registration of boats to August 15, 1963. In light of this action, it becomes unnecessary to further pursue the question and boats and vessels pursuant to the act are required to be registered as of August 15, 1963.

063-79—July 19, 1963

TAXATION

TAX DEED SALES—TIME FOR HOLDING ON HOLIDAY—
 §§192.21, 194.15-194.19, 194.21, 55.45, 683.01-683.07, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Whenever the first Monday of any month falls on a legal holiday, may tax deed sales be held on the following said holiday?

It is required by §194.21, F. S., that sales of lands encumbered by ad valorem tax liens, under applications for tax deed sales (§§194.15-194.19, F. S.) "shall be sold at public auction by the clerk of the circuit court of the county wherein such lands are located, and such sale shall be held only on the first Monday in each month, and during the legal hours of sale, and such sales shall be held at the courthouse door." The reference to "legal hours of sale" appears to refer to §55.45, F. S., which provides that "all sales of property under legal process shall take place between the hours of 11:00 a.m. and 2:00 p.m. of any day of the week except Saturday and Sunday . . ." Under said §194.21, tax deed sales held thereunder should be held on the first Monday in the month of sale.

Sections 683.01-683.07, F. S., declare the legal holidays in this state. The legal holidays mentioned in §683.01, F. S., appear to be in regard to the presenting for payment and acceptance and the protesting and giving notice of dishonor of negotiable instruments. Section 683.02, F. S., refers to the performance of contracts when the day for performance falls on a legal holiday. None of these statutes providing for holidays makes mention of tax deed sales which have been advertised for holidays.

The Florida court, in *Russ v. Gilbert*, 19 Fla. 54, text 60, held that a default might be entered against a defendant not appearing to a summons returnable on a rule day, which was also a July 4, the court holding that there was no statute or law which inhibited the court from taking judicial action on said day. In *Newsom v. State*, Fla. 54 So. 2d 58, the supreme court held that an appeal taken on a Monday, following the expiration of the time for taking an appeal on Sunday preceding said Monday, was not within the time allowed. The appeal was dismissed. In *Re McRae's Estate*, Fla., 73 So. 2d 818, the statutory 30 days within which to appeal a judgment of a county judge's court fell on a Sunday; the court dismissed an appeal taken on the Monday following the said Sunday. In 40 C. J. S. 411, §3, it appears that "the legal status of holidays differs from that of Sundays; holidays have effect only as to those transactions set forth in the statutes establishing them, and all other acts performed on holidays are fully effective."

We find nothing in any of the statutes and laws of Florida which expressly permits tax deed sales on any day other than the first Monday of the month. It is noted that §194.21, F. S., above-mentioned, requires that tax deed sales "shall be held *only* on the first Monday in each month . . ." (Emphasis supplied.) This is in terms a mandatory requirement. Because of language used in §192.21, F. S., the courts might hold the said provision to be directory instead of mandatory; until a court of competent jurisdiction holds, we must construe the said provision in §194.21 as being mandatory and that tax deed sales must be held on the first Monday of the sales month, even if such said date be a holiday recognized by said §§683.01-683.07, F. S. The question here considered goes to the validity of a land title under tax deeds, which is an additional reason for holding such sales on the first Monday of the sales month as provided in §194.21, F. S.

The above stated question is answered in the negative. Tax deed sales must be held on the first Monday of the month, even when said first Monday is a holiday.

063-80—August 15, 1963

TAXATION

BOATS AND VESSELS—1963 AD VALOREM TAXES—CH.
63-550 (PART II, CH. 371, F. S.), LAWS OF FLORIDA:
§13, ART. IX, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Does Ch. 63-550, nullify and require the striking of ad valorem taxes, assessed against boats and vessels for the tax year of 1963, from the tax rolls?

Section 2, Ch. 63-550, provides in part as follows: "all boats and vessels hereinafter described propelled in whole or in part by motor or sail either inboard or outboard, are hereby declared to be *motor vehicles*." Section 3 provides: "'vessel' is synonymous with 'boat' as used in this act and means a motor or artificially propelled vehicle as property and defined in Article IX, Section 13 of the Constitution of Florida of every description of watercraft and air boats, other than a seaplane on the water, propelled by motor or sail, and designed for navigation and used or capable of being used as a means of transportation on water." Section 4 provides "*all boats and vessels and outboard motors capable of propelling any such boat or vessel shall be exempt from any personal property tax and in lieu thereof shall pay a boat registration certificate tax.*" (Emphasis supplied.)

Section 13, Art. IX, State Const., is as follows:

SECTION 13. Motor vehicles subject to single property tax.—Motor Vehicles, as property, shall be subject to only one form of taxation which shall be a license tax for the operation of such motor vehicles, which license tax shall be in such amount and levied for such purpose as the Legislature may, by law, provide, and shall be in lieu of all ad valorem taxes assessable against motor vehicles as personal property.

In light of the above, it is evident that the 1963 legislature has classified boats and vessels as "motor vehicles" and therefore under the State Const. they are exempt from personal property taxes.

Section 13 of Ch. 63-550, provides that the same shall take effect July 1, 1963.

From and after the effective date of the act, boats and vessels, having been classified as motor vehicles, are by the constitution exempt from personal property taxes and this exemption is effective even though they might have been previously assessed and on the tax rolls. Thus, Ch. 63-550, nullifies and requires the tax collectors of the several counties to strike ad valorem taxes previously assessed against boats and vessels for the tax year 1963 and your question is answered in the affirmative.

063-81—July 22, 1963

PUBLIC DEFENDER

PROHIBITION AGAINST OTHER PRACTICE OF CRIMINAL LAW—CH. 63-409, LAWS OF FLORIDA; §27.51(3), F. S.

To: *Lee R. Horton, Jr., Public Defender, Lake Wales*

QUESTION:

Inasmuch as you have accepted the office of public defender for the 10th judicial circuit, does §2(3) of the public defender law, the same being Ch. 63-409, require you to relinquish your position as prosecutor in a municipal court in the city of Lake Wales?

Section 2(3) of the public defender law, Ch. 63-409, provides as follows:

(3) The public defender shall give priority and preference to his duties under the provisions of this act and may engage in the private practice of law only to the extent that it will not interfere with or prevent performance of his duties as public defender and shall not otherwise engage in the practice of criminal law. (Emphasis supplied.)

It is my opinion that by enacting said statutory provision, the legislature intended to prohibit a public defender from engaging in the practice of criminal law otherwise than in his official capacity as public defender.

Also, I think that the court would have substantial basis for a holding that you would be engaged in "the practice of criminal law," within the contemplation of said quoted subsection, if you perform the duties of prosecutor in a municipal court, and therefore, since you have accepted the office of public defender, I cannot say that you are entitled to continue in your position as city prosecutor.

Consequently, I suggest that you either relinquish your post as city prosecutor or that you secure a judicial determination of the question of whether it is necessary for you to do so.

063-82—July 25, 1963

PUBLIC DEFENDER

PAYMENT OF OFFICE EXPENSES, CH. 63-409, LAWS OF FLORIDA; §§27.53(1), 125.43(1), F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTIONS:

1. In judicial circuits comprised of more than 1 county, may boards of county commissioners of the sev-

eral counties pay the expenses of the operation of the office of the public defender and assistant public defenders?

2. What procedures should be followed in such judicial circuits in connection with the payment of the office expenses of the public defender and his assistants?

AS TO QUESTION 1:

"The public defender may also hire assistant public defenders, investigators, secretaries, and other clerical help as funds available may permit and as otherwise provided by law. Each of the counties of this state is empowered to expend moneys in furtherance of the provisions of this act." Section 4 (1), Ch. 63-409.

The Boards of county commissioners of the several counties or any 2 or more of them are authorized to enter into and carry into effect contracts and agreements relating to the common powers, duties and functions of said boards of county commissioners, or to the common powers, duties and functions of any 2 or more said boards of county commissioners. Section 125.43 (1) F. S.

In view of the above statutory provisions, I am of the opinion that in those judicial circuits comprised of more than one county, the respective boards of county commissioners would be authorized to provide for the payment of the expenses of the operation of the office of public defender by agreement between such boards, if they saw fit to do so. Question 1 is answered in the affirmative.

AS TO QUESTION 2:

Such an agreement if entered into among several counties comprising a judicial circuit would provide that each county's contribution for the expense of the office of public defender would be paid to the board of county commissioners of the county or the clerk of the circuit court thereof where the public defender has his residence. The funds so contributed would be disbursed through the office of the clerk of the circuit court of said county. Each county would provide in its county budget the amount it agreed to contribute.

The above procedure would provide necessary controls for expenditure of public funds, through a consolidated fund disbursed through the office of the clerk of the circuit court of the county of the public defender's residence. The same would provide means for both the auditing and accounting of such funds.

This is not to indicate that a county's contribution could not be made without there being a contribution agreement among the counties of the circuit, but is recommended as a more systematic and efficient method.

Single county circuits would, of course, handle their contributions without the need of a contribution agreement, by direct budgeting of the amount or amounts contributed with disbursement of such funds through the office of the clerk of the circuit court. Question 2 is answered accordingly.

063-83—July 25, 1963

PUBLIC CONTRACTS

CONFLICT OF INTEREST—EFFECT OF NOT VOTING— §§839.07, ET. SEQ. F. S.

To: Dan R. Warren, State Attorney, Deland

QUESTION:

Can a member of a public governing body who has a personal interest in a contract avoid the restrictions of §§839.07, F. S., et seq., by not voting on the approval or rejection of the contract?

Sections 839.07 F. S. et seq., are the state conflict of interest statutes which prohibit public officials from entering into contracts in which they have a personal interest. Generally a contract in which a public official has an interest is invalid "even though the council member did not vote for the ordinance authorizing the contract, did not use his influence on other members of the council, and the contract is fair and free from fraud." 37 Am. Jur. 897, Municipal Corporations, Sec. 275, citing *Montgomery v. City of Atlanta*, 162 Ga. 534, 134 S. E. 152, 47 A. L. R. 233.

In the city of Atlanta case, supra, the court said at 134 S. E. 157:

... It does not alter the case that Inman did not vote for the ordinances relating to the laying of this pavement, and that he did not use his influence to induce other members of the general council to vote therefor. The fact that he did not take any part in securing this contract for his corporation does not change the situation. The City of Atlanta and its citizens were entitled to have this councilman exercise his administrative and executive ability in securing the best contract that could be had for the laying of this pavement, and to see that the pavement came up to the plans and specifications under which it was laid, and that the terms of the contract were faithfully performed. This he could not do if he were a party at interest under the contract. Inaction on the part of the councilman in this respect amounted to a violation of his duty to the public. *Ensley v. Hollingsworth*, 170 Ala. 396, 54 So. 95, Ann. Cas. 1912D, 652; *Bay v. Davidson*, 133 Iowa, 688, 111 N.W. 25, 9 L.R.A. (N.S.) 1014, 119 Am. St. Rep. 650. This principle applies, although the contract is fair and free from fraud. Public policy will not uphold it. *Macon v. Huff*, supra. The contract will not be upheld by reason of the fact that the public has received a benefit thereunder. *Horkan v. City of Moultrie*, 136 Ga. 561 (2), 71 S.E. 785. (Emphasis supplied.)

See also *City of Bristol v. Dominion Nat. Bank*, 153 Va. 71, 149 S.E. 632 wherein the court said at page 634:

Councilman Goodwyn did not vote, but that does not affect the principle involved.

In *Beebe v. Supervisors of Sullivan County*, 64 Hun. 377, 19 N.Y.S. 629, 630 (affirmed 142 N.Y. 631, 37 N.E. 566), the court said:

It is said in the case before us that the supervisor who was employed did not vote on the question of his own employment, or upon the audit of his bill. That does not cure the evil.

The influence upon (his) fellow members is the same. His constituents are entitled to his judgment in making contracts, to his scrutiny in passing upon accounts, and to his unbiased and disinterested efforts in both; and he cannot make the violation or neglect of the duties he owes to his constituents the means of validating an otherwise illegal act. He cannot put on and off the garb of a public official, and discharge or refuse to discharge the duties of his trust, at will, and as best subserves his private interests. He is a part of the board of supervisors. Its act is his act; and he cannot, as a supervisor, make a contract with himself as a private citizen.

While I realize the above cited authorities are from other jurisdictions, the Florida courts have been strict in their decisions interpreting §§839.07, F. S. et seq. and have consistently held contracts invalid where public officials had a personal interest in the matter. See *Watson v. City of New Smyrna Beach*, 85 So. 2d 548 where the court said at page 550:

Honest as may have been the motives of all concerned, mischief could result from such a situation, if not in this case, certainly in cases to follow were it to become a precedent.

Further there appears to be serious question as to whether a commission member can relinquish his interest in a contract merely by failing to cast an affirmative vote for the particular contract under consideration. In *State ex rel. Miller v. Marshall*, 184 So. 870, a case relating to the City of Jacksonville, the Florida supreme court stated at page 874:

The weight of authority in the country appears to support the common law rule as enunciated by Lord Mansfield in *Oldknow v. Wainwright*, 2 Burr. 1017 (English Reports, Full Print, Vol. 97, page 683) to the effect that whenever electors are present and do not vote at all, they virtually acquiesce in the election made by those who do. The common law of England is in force in Florida. See Section 87, C.G.L.

Accordingly, it would appear that a member of a governing body who abstains from voting on a contract does under the law of this state actually acquiesce in the acceptance of said contract, and under the above-cited authorities would be a party to the letting of said contract in violation of the provisions of §839.07, F. S. While the matter cannot here be decided with finality, and a court might hold otherwise, such consequences seem unlikely in view of the supreme court's opinion in *Watson v. City of New Smyrna Beach*, supra.

Your question as stated above is answered in the negative.

063-84—July 26, 1963

DEPOSITIONS FOR PUBLIC MONEYS

COUNTY DEPOSITORIES—INTERPRETATION OF TERM "PRO RATA DISTRIBUTION" AS PROVIDED IN §136.02(1), F. S.; CH. 63-112, LAWS OF FLORIDA

To: *Bruce Collins, Clerk of Circuit Court, Panama City*

QUESTION:

What is the proper interpretation of "pro rata" as contained in §136.02 (1), F. S., wherein it is stated: "...When a bank or banks in the county qualify as a county depository as herein provided such bank or banks

shall be eligible to receive deposits of the funds of the officers and boards herein mentioned, and shall be entitled to its or their pro rata share of the deposits of the board of county commissioners and board of public instruction of such county; . . .”?

Section 136.02 (1), F. S., provides among other things that: “Any bank . . . desiring to become a county depository as herein provided shall make satisfactory deposits with or to the credit of the Comptroller of the State, of the securities of the kind herein authorized, *approved by the Comptroller and in an amount to be determined by the Comptroller*, conditioned that said bank insure the safekeeping, proper accounting for and payment over to the proper authority of all money that may come into its possession by virtue of its acting as said depository, . . .” (Emphasis supplied.) Said statute further provides that when such conditions are met, the comptroller of the state shall issue his certificate showing that said bank has qualified as a county depository. Where more than 1 bank in a particular county qualifies as a county depository, it is entitled under the statute to receive a pro rata share of the funds to be deposited by the board of county commissioners and the board of public instruction of such county.

“Pro rata means according to a measure which fixes proportions. It has no meaning unless referable to some rule or standard” (Words and Phrases, Vol. 34A, p. 470).

Hence, a pro rata distribution of deposits of county money among several banks located in the county, which banks have qualified as county depositories with the comptroller, must be based upon some fixed standard.

We are inclined to the view that in a county where several banks have qualified as county depositories by deposit of securities pursuant to the provisions of §136.02 (1), F. S., all banks so qualified should receive a deposit of an equal amount of public funds to the extent of the security for public deposits. By way of illustration: In a county where 4 banks had qualified as depositories, one of which qualified with securities in the amount of \$100,000, two with securities in the amount of \$200,000, and the fourth with securities in the amount of \$400,000, the public funds to be deposited pursuant to §136.02 (1), *supra*, should be equally distributed among such banks up to the \$100,000 securities level. Funds in excess of that amount should then be deposited equally among the 3 banks having deposit securities in excess of \$100,000 until the deposits in such banks reach the \$200,000 level. The then excess of public funds to be deposited could be placed with the remaining bank up to the maximum level of its deposit securities: viz, \$400,000.

Practicalities involved in the handling of public moneys must be recognized. No stringent interpretation of §136.02 (1), F. S., should operate to defeat the basic intention of said section that public moneys on deposit in a bank be secured in toto while so deposited. The financial transactions of public bodies should be afforded the same unobstructed freedom of transaction as do those of private business enterprises.

In this connection, we point out that should a county be called upon to make a substantial disbursement of its funds on deposit in several recognized county depositories, the disbursing public body would not be required to draw disbursement warrants of equal amounts on all county depositories. The disbursement could be made from funds held by a single depository. Where such is done, it would appear proper that as soon as practical, other public moneys received by the board which has made the disbursement should be deposited in that bank

from which the substantial withdrawal has been made. Such a practice would prevent extensive bookkeeping on the part of said boards.

The obligations placed on the board of county commissioners and the board of public instruction in not showing favoritism to a particular bank over other banks where several have qualified as county depositories were pointed out in Ch. 63-112, wherein the legislature stated that a county officer who is also an officer or a stockholder in a bank would not prevent said bank from qualifying as a county depository so long as the depositing board determines that the bank seeking to qualify was not favored over such other qualified banks within the county.

063-85—July 26, 1963

COUNTY LIABILITY

REIMBURSEMENT OF EMPLOYEE FOR LOSS OF PERSONAL PROPERTY DESTROYED IN LINE OF DUTY—SHERIFF'S OFFICE—CH. 440, F. S.

To: *J. A. Madigan, Jr., Attorney for Sheriff's Association, Tallahassee*

QUESTION:

Is it permissible for a sheriff's department to reimburse employees for personal property destroyed in the line of duty through no contributory negligence on the part of the employee?

In Sheriff Starr's letter he asked whether it would be permissible for a sheriff's department to reimburse employees for personal property destroyed in the line of duty, such as broken eyeglasses, dentures, wrist watches, etc., occurring in the handling of prisoners and auto accidents through no contributory negligence on the part of the employees.

Under Ch. 440, F. S., there appears to be no provision for reimbursement to an employee for the loss of personal property as opposed to compensation allowed for personal injury or death by accident. In the case of *Southern Electric, Inc. v. Ralph H. Spall*, 130 So. 2nd 279, the supreme court of Florida was faced with the problem of whether injury to artificial members or prosthetic devices were compensable. In that case, the court stated that:

This is a case of first impression in State but the answer is clearly discernible from the plain provisions of the Florida Law limit coverage specifically to 'personal injury or death by accident. . . and such diseases or infections as naturally or unavoidably result from such injury.' The Act makes no provision for compensation for damage to artificial members or prosthetic devices which are *personal property* and not a part of the person. . . . (Emphasis supplied.)

In light of the above quoted case, it appears that the answer to Sheriff Starr's question is in the negative. Since such items as eyeglasses, dentures, wrist watches, etc., would be considered as personal property, as opposed to personal injury.

063-86—July 26, 1963

PUBLIC UTILITY ARBITRATION LAW

AUTHORITY OF STATE TO ACT PURSUANT TO CH. 453, F. S.

To: *Richard W. Youngman, Director, Florida Mediation Service,
Tallahassee*

QUESTION:

May the state of Florida invoke the powers under
Ch. 453 F. S., the public utility arbitration law?

Chapter 453, F. S., the public utility arbitration law, authorizes the chief executive, upon petition of either party to a labor dispute in a public utility, to appoint a mediator who will meet with the 2 parties to the controversy to attempt to work out a settlement of the dispute for a period of 30 days. If the conciliator is unable to effect settlement within 30 days, the governor has the authority to appoint a board of arbitration who shall make findings which are reviewable in the state courts.

This state statute is almost identical to a Wisconsin law, which was upheld by the Wisconsin supreme court in the case of *Wisconsin v. Amalgamated Association*, 42 N.W. 2d 451, (1950). The Wisconsin supreme court decision was appealed to the U. S. supreme court and in the case of *Amalgamated Association v. Wisconsin*, 95 Law Ed. 364, 340 U. S. 383, (1951), was held to be inoperative on the grounds that the federal congress had preempted the field. Mr. Justice Frankfurter, joined by 2 other justices of that court wrote a dissent, which followed the rationale of the Wisconsin supreme court to the effect that the state, in the exercise of its police power, had the authority to regulate public utilities and to provide for settlement of labor disputes which would preclude the loss by the public of utility services. It was this dissent of Mr. Justice Frankfurter and the unanimous decision of the Wisconsin supreme court, which formed the basis for this office's vigorous argument before the Florida supreme court as to the constitutionality of the Florida public utilities arbitration law. The Florida supreme court in the case of *Henderson v. State*, 65 So. 2d 22 (1953), held the act inoperative solely on the basis of the U. S. supreme court decision. The court did not inquire into the merits of the cause. It merely held that a majority decision of the U. S. supreme court bound the Florida supreme court to declare the act inoperative.

Any doubt concerning the legal status of the matter was resolved in the decision of the U. S. supreme court in the case of *Braunstein v. Commissioner*, dated June 10, 1963, recorded in 31 L.W. 4609, in which the U. S. supreme court with one justice dissenting, reaffirmed the decision in the Wisconsin case.

It is also noted that Florida's senior senator, the Hon. Spessard L. Holland, has proposed an amendment to the Landrum-Griffin act which would specifically authorize state statutes similar to the one passed in Florida and this amendment has been rejected by the congress.

The sole basis for the decision in this matter was a constitutional question and constitutional rights, of course, may be waived. For this reason, if the parties mutually agreed to arbitration, then the state would be authorized to act under the statute.

In the absence of mutual consent to arbitration, the state of Florida would be prohibited from invoking its powers under Ch. 453, F. S., and your question must be respectfully answered in the negative.

063-87—July 26, 1963

TAXATION

ANTIQUES AND STAMP COLLECTIONS—§§193.06, 193.11-193.13, 193.22, 199.05, 200.06, 200.08, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are antiques and stamp collections subject to ad valorem taxation, and, if so, what is the standard of valuation to be used?

Real and personal property (tangible and intangible) are subject to taxation in this state on the basis of their full cash value (§§193.06, 193.11, 193.12, 193.13, 193.22, 199.05 and 200.06, F. S.), or true cash value as used in some of said statutes. Antiques and stamp collections are taxable at their full or true cash value.

In *Florida Public Utilities Co. v. Webster*, 150 Fla. 378, 7 So. 2d 788, text 790, the court had for consideration an action in damages for the destruction of antiques, and in the course of its opinion said that "if the damage is to personal property as in this case, it may be impossible to show that all of it had a market value. In fact it may be very valuable so far as the owner is concerned but have no value so far as the public is concerned." In *American Philatelic Society v. Claibourne*, 3 Cal. 2d 689, 46 P. 2d 135, text 137, the court stated that "many hundreds of thousands of dollars are invested in stamps, the value of which lies, not in their beauty or design, but in their rarity." In *Maher v. Commonwealth*, 291 Mass. 343, 197 N. E. 78, the court said that sentimental value should not be considered as an element of value.

The court, in *City of Tampa v. Colgan*, 121 Fla. 218, 163 So. 577, text 582, defined "fair market value" to mean "the amount of money which a purchaser, willing but not obliged to buy the property, would pay an owner willing but not obliged to sell it, taking into consideration all uses to which the property is adapted and might in reason be applied." In *Hillsborough County v. Knight & Wall Co.*, 153 Fla. 346, 14 So. 2d 703, text 705, the court remarked that "value for purposes of taxation is to be determined by taking into account not one, but all, favorable and unfavorable circumstances that would control the admeasurement of its present value were it placed upon the market to be sold by the owner . . . if similar property is commonly bought and sold the price which it brings is the best test of the value . . . But where an established market is nonexistent the process of valuation must comprehend not only one but all of the influencing factors going to make up intrinsic value." Valuations for purposes of taxation must have a just relation to the real value of the property assessed (*Schleman v. Connecticut General Ins. Co.*, 151 Fla. 96, 9 So. 2d 197, text 199). See also 14 C. J. S. 22; 84 C. J. S. 149, §52, note 33; 17 Words and Phrases 774-777.

The influencing factors going to make up the intrinsic value of antiques and stamp collections may or may not be the same in all cases, and the location of the antiques and stamp collections may vary from place to place, all going to the value thereof.

Antiques, including antique furniture, and stamp collections, not being exempted by law from taxation, are subject to ad valorem taxation. The measure of value of such items, except in exceptional cases, is the full or fair market value thereof, as above defined. In exceptional

cases the tax assessor must use his discretion, applying as many of the above rules as may be used, as to the market value of the said items. See §200.08, F. S., placing household furnishings in a special class for tax purposes. This would seem to include antique furniture used in the home and not held for commercial purposes.

063-88—July 31, 1963

LEGISLATURE

SUBSISTENCE PAY FOR MEMBERS OF SENATE DURING IMPEACHMENT TRIAL—§112.061(6)(b)2., F. S. (AS AM. BY 63-400); §29, ART. III, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What amount of subsistence pay, under §112.061, F. S., as amended by Ch. 63-400, are senators entitled to during an impeachment trial before them?

It is provided in and by §112.061(6)(b)2., F. S., as amended by Ch. 63-400, that members of the legislature are entitled to subsistence pay in the sum of \$25 per day when the legislature is in session. The house of representatives of Florida has the sole power of bringing impeachment proceedings against officers of Florida subject to impeachment, including circuit judges. All impeachment proceedings in Florida are tried by the Florida senate. Under §29, Art. III, of the State Const., "*the Senate may adjourn to a fixed date for the trial of any impeachment, and may sit for the purpose of such trial whether the House of Representatives be in session or not.*" (Emphasis supplied.) Section 29, Art. III, of the present State Const., appears to have been taken verbatim from §29, Art. IV, of the 1868 State Const., as amended in 1875. Prior to said 1875 amendment there was no provision for the trial of impeachment other than during a session of the legislature, and no provision fixing a time within the 6 months following the adjournment of the legislature. Prior to 1875 there was no constitutional provision permitting impeachment trials other than during sessions of the legislature.

Although the senate, when trying impeachment proceedings, is deemed to be a court of impeachment (3 Willoughby on the Const., 2nd Ed. 1450, §932; 15 Am. and Eng. Enc. of Law, 2nd Ed. 1064; 2 Jones' Blackstone, 2475, §296; 1 Andrews American Law 242, §201; Opinion of Justices, 14 Fla. 289, et seq.), it is still the senate, 1 of the 2 legislative bodies, in session trying the impeachment charge made by the other house, the house of representatives. In Advisory Opinion, 64 Fla. 16, 59 So. 782, and in Advisory Opinion, 31 Fla. 1, 12 So. 114, it was held that the senate was not engaged in legislative business when considering appointments by the governor requiring their concurrence, and when considering recommendations by the governor in connection with suspensions from office by him for removal from office. In these cases the senate was nevertheless in session as an arm of the legislature performing functions not within the jurisdiction of the house of representatives. Such actions by the senate, although not in conjunction with the house of representatives, are nevertheless legal action on the part of the senate.

Members of the senate are in legal effect ex officio judges of a court of impeachment when hearing an impeachment charge filed by

the house of representatives, so that when sitting ex officio as a court of impeachment the said senators are nevertheless a single legislative body in session. Although the legislature is not in session as a whole, the senate is in session as a legislative body acting ex officio as a court of impeachment, when trying impeachment cases.

We are, therefore, of the opinion that the legislature of Florida, when it enacted Ch. 63-400, amending §112.061, F. S., intended that the senate, when sitting as a court of impeachment, should be considered as being in session, within the purview of §112.061(6)(b)2., F. S., as amended, and should be paid subsistence pay in the sum of \$25 per day when sitting as a court of impeachment. The entire legislature not being in session, house members, the governor, and members of the state cabinet are not within the purview of said §112.061(6)(b)2., F. S., as amended, during an impeachment trial.

This opinion is in harmony with AGO 057-142 (p. 168 1957-1958). To sum up, it appears that §29, Art. III of the State Const. as adopted in 1885 had the effect of authorizing the senate to adjourn or recess its session to a fixed date to sit for the trial of any impeachment. Its status in such an impeachment session is an extension of its existence as a legislative body by constitutional authority and entitles its membership to the same per diem and expenses to which they were entitled in the earlier joint session.

063-89—August 1, 1963

TAXATION

SALES AND USE TAX—CHARGES MADE FOR ALTERATION OF CLOTHING WHEN BOUGHT—§212.02(4)(5), F. S. (AS AM. BY CH. 63-526)

To: J. Ed Straughn, Director of Revenue, Tallahassee

QUESTION:

Are the charges made by retail clothing stores for alteration of articles of clothing purchased from them subject to the Florida sales tax statutes?

Section 212.02, F. S., sets out the definition of certain specified words and phrases used in Ch. 212, F. S., and defines their meaning as used in said Ch. 212. Subsection (5) of said section defines the phrase "cost price" as meaning "the actual cost of articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor or service costs, transportation charges, or any expense whatsoever." Subsection (4) of said section, prior to its 1963 amendment by Ch. 63-526, provided that the phrase "sales price means the total amount for which tangible personal property, including any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, *without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, interest charged, losses, or any other expense whatsoever; provided that cash discounts allowed and taken on sales shall not be included, nor shall the sales price include the amount charged for labor or services rendered in installing, applying, remodeling or repairing the property sold.*" (Emphasis supplied.)

The legislature, by §1, Ch. 63-526, amended §212.02(4), F. S., which deletes or omits the phrase "nor shall the sales price include the

amount charged for labor or services rendered in installing, applying, remodeling or repairing the property sold." Being omitted from the amended subsection the language omitted ceased to be a part of the subsection. (*Basnett v. Jacksonville*, 19 Fla. 664, text 667; *State v. County Commissioners of Duval County*, 23 Fla. 483, 3 So. 193, text 204; *Jacksonville v. Ledwith*, 26 Fla. 163, 7 So. 885, text 890). So much of the statute as was omitted was repealed (82 C. J. S. 504, §294, note 28). Where there is an amendment to a section of the statutes, the amendatory section takes the place of the section amended as a part of the original law. (*Singleton v. Lawson*, Fla. 46 So. 2d 186, text 190; *Miami Bridge Co. v. Railroad Com.*, 155 Fla. 366, 20 So. 2d 356, text 359; *State v. Gray*, 107 Fla. 73, 144 So. 349, text 353). The amended section has the same relation to other parts of the same law as did the section amended (*State v. Gray*, supra.). The amendment becomes a part of the original statute as if it had always been contained therein (82 C. J. S. 902, §384).

The effect of this amendment was to delete the portion omitted from the statute as amended as an exception or limitation of the said subsection, and make the remainder of the subsection which was left unchanged fully effective without the exemption or limitation contained in the deleted portion of the said subsection. The subsection should *hereafter* be read as if the deleted portion had never existed. The proviso or exception from the subsection now relates to cash discounts only, *not* to the amount charged for labor services rendered in installing, applying, remodeling or repairing the property sold. Such *amount charged* is no longer excepted from the taxable amount and should *hereafter* be included.

Charges made by retail clothing stores for the alteration of articles of clothing purchased from them would appear to be included in the terms "labor" or "service" or "any other expense whatsoever," as used in said §212.04(4), F. S., defining "sales price." Such services would also appear to be a part of the "cost price" as defined in §212.04(5), F. S.

063-90—August 1, 1963

PUBLIC DEFENDER

CONSTRUCTION OF §3, CH. 63-410, LAWS OF FLORIDA—
STATEMENT OF CLAIM, LIEN—CH. 63-409, LAWS OF
FLORIDA; §§27.51, 27.52, 27.56, F. S.

To: *Joseph G. Spicola, Jr., Public Defender, Tampa*

QUESTIONS:

1. Who files the "statement of claim" provided for in §3, Ch. 63-410, relating to the lien therein declared?
2. Who is liable for the costs and expenses of filing the said "statement of claim" for record in the counties mentioned?
3. In what form should the said statement of claim be made for filing and recording purposes?
4. Must the court enter an order setting the value of the services rendered the defendant by the public defender?
5. May the court enter a general order for such services applicable to all future cases, or must a statement of claim be prepared and filed in each case defended by the public defender?

6. Must the public defender defend indigent defendants in the justice of the peace and county judge's courts?

7. Who is charged with the enforcement of the liens created and established by said §3, Ch. 63-410?

Chapter 63-410, must be read and construed in the light of Ch. 63-409, creating the office of public defender in this state and providing their powers and duties. In this connection, §2 of said Ch. 63-409, provides in part that the "public defender shall represent *any person* who is determined to be insolvent as provided in this act (Section 3, Chapter 63-409, Acts of 1963), who is under arrest for, or is charged with, a *noncapital felony*, if such person requests it, or if the court on its own motion . . ." This seems to limit the public duties of the public defenders to the defense of indigent persons charged with noncapital felonies, and such duties do not seem to extend to the defense of persons charged with misdemeanors. (Emphasis supplied.)

Section 3, Ch. 63-410, creates and establishes a lien encumbering "all the property, both real and personal, of any person who is receiving or has received any assistance from any public defender . . . Such assistance shall constitute a claim against the applicant (defendant defended by the public defender) and his estate, enforceable according to law in an amount to be determined by the court in which such assistance was rendered." This seems to give the state of Florida a lien on the property of the defendant defended by a public defender to secure the payment in such amount as may be determined by the court to be the reasonable value of such defense services. The said lien becomes a continuing obligation of the defendant and his property, notwithstanding any statutes of limitation. The amount of this lien must be determined by the court in which such assistance was rendered by the public defender, "immediately after such assistance is rendered." The value of such assistance to the defendant should be determined by the court in like or similar manner to the determination of attorneys fees in law and chancery cases in applicable cases. The court would seem to have the right to obtain the testimony of attorneys and other persons on the question of the value of the services rendered, if deemed desirable, or in proper cases fix such fees from his own knowledge and information. The court may on its own motion proceed to the fixing of such fees; and in cases where the court does not so proceed, the public defender, or his assistant rendering the defense services, may by motion bring the question of fees before the court. Doubtless, the court would have jurisdiction to continue the fixing of such fees to another date.

Said §3, Ch. 63-410, further provides that when the value of such services by the public defender to the defendant, have been determined by the court, "a statement of claim showing the name and residence of the recipient (defendant) shall be filed for record in the office of the clerk of the circuit court in the county where the recipient resides and in each county in which the recipient then owns or later acquires any property." Due to the fact that the court determines the value of the assistance rendered the defendant by the public defender, we must presume that a minute will be made of such proceeding and the sum allowed as the value thereof, a copy of which may be attached to and filed with "statement of claim" to be filed with the clerks of the circuit courts mentioned in §3, Ch. 63-410.

It is also provided in said §3 of Ch. 63-410, that "said liens shall be enforced *on behalf of the state of Florida* by the several public defenders. . ." This seems to place on the public defenders the

burden of enforcing said liens, for and in behalf of the state. This also seems to indicate that the "statement of claim" required by §3, Ch. 63-410, should be prepared and filed also by the public defender for and in behalf of the state of Florida. (Emphasis supplied.)

The question of clerk's fees for the filing and recording of such "statement of claim" arises. We find nothing in said Ch. 63-410 or Ch. 63-409, also relating to public defenders, for the payment of clerk's fees for filing and recording said "statement of claim." The statement was made in *Rawls v. State*, 98 Fla. 103, 122 So. 222, that "public officers have no legal claim for official services rendered, except when, and to the extent that, compensation is provided by law, and when no compensation is so provided, the rendition of such services is deemed to be gratuitous." Cited with approval in *Brown v. St. Lucie County*, 114 Fla. 789, 153 So. 906, text 907, (sheriff's fees); and quoted with approval in *State v. Reardon*, 114 Fla. 755, 154 So. 868, text 871; *Gavagan v. Marshall*, 160 Fla. 154, 33 So. 2d 862, text 864; and *City of Homestead v. DeWitt*, Fla. App. 3rd District, 126 So. 2d 582, text 584.

In the light of the above and foregoing the above questions are answered as follows:

1. The "statement of lien" provided for in §3, Ch. 63-410, relating to the lien therein declared, should be prepared and filed by the public defender or an assistant public defender.

2. The "statement of lien" being filed by the state of Florida must be accepted, filed and recorded by the clerks of the circuit court without the payment of any fees or costs, unless and until provision be made for such payments.

3. The following form of "Statement of Claim" is suggested:

STATEMENT OF CLAIM

Pursuant to Chapter 63-410, Acts of 1963, _____, as Public Defender for the _____ Judicial Circuit of Florida, files this, a Statement of Claim, against _____ whose address is _____, and in favor of the State of Florida, in the sum of _____ dollars, pursuant to court order dated _____, 19 _____, for services rendered as public defender for _____ in Case No. _____ up to and including _____, 19 _____, in the (here identify the court) of _____ County, Florida.

This _____, 19 _____.

We doubt that the "statement of claim" must be sworn to or made under oath.

4. The court should determine the value of the services rendered the defendant by the public defender, and enter such determination in the minutes of the court.

5. We feel that the statute contemplates the determination of the value of the services of the public defender in each and every case coming before the court, that is defended by the public defender. This order is the basis for the lien.

6. Public defenders appear to be limited to those cases of felonies less than capital. This would seem to exclude justice of the peace, county judges' courts and city courts under present statutes and laws except as to preliminary hearings where the magistrate holding such hearing should fix the value of the services rendered by the public defender in connection therewith.

7. By express provision in §3, Ch. 63-410, liens arising under said section must be enforced by the public defender of the county affected, including his successors in office.

NOTE. There appears to be some conflict between §3, Ch. 63-409, which provides for the enforcement of the state's lien by the *state attorney*, and §3, Ch. 63-410, which provides for the enforcement of a like lien by the public defender. An examination of the 2 chapters reveals that Ch. 63-409 became a law on June 12, 1963, while Ch. 63-410 became a law on June 13, 1963, and is the latter law in point of time and controls as to conflicts between the two laws.

063-91—August 2, 1963

NOTARY PUBLIC

EFFECT OF CONVICTION OF A FELONY ON RIGHT TO ACT AS NOTARY—§15, ART. IV, STATE CONST.

To: *Veterans Administration, Jacksonville*

QUESTION:

Where a notary public, licensed as such under the statutes and laws of Florida, is convicted of a felony in a federal court, may such person perform the duties of a notary public in this state after such conviction?

Notaries public are now generally considered to be public officers (23 Fla. Jur. 471, §1; 39 Am. Jur. 213, §3; 66 C. J. S. 609, §1). The suspension and removal of notaries public in Florida, under the provisions of §15, Art. IV, of the State Const., are not unheard of, there being instances of such suspensions and removal. Under said §15, Art. IV, "all officers that shall have been appointed or elected, and that are not liable to impeachment, may be suspended from office by the Governor for . . . for the commission of any felony . . . and the Governor, by and with the consent of the Senate, may remove any officer, not liable to impeachment, for any cause above named." We find nothing in the State. Const. disqualifying officers in this state from performing the functions of their offices merely upon their being convicted of a felony, the remedy being suspension and removal from office pursuant to §15, Art. IV, of the State Const. In some states there are statutory or constitutional provisions providing that an office shall be deemed vacant on conviction of a felony. (67 C. J. S. 208, §50).

Under the constitution and statutes of Florida, where a notary public, licensed as such under the statutes and laws of Florida, is convicted of a felony in a federal court such person may continue to perform the duties of a notary public in this state, unless suspended from office in accordance with §15, Art. IV, of the State Const.

063-92—August 5, 1963

TAXATION

EDUCATIONAL INSTITUTIONS—TAX EXEMPTION RIGHTS, DATE OF ATTACHMENT OF RIGHT—§1, ART. IX, §16, ART. XVI, STATE CONST.; §192.06, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

In the case of an educational institution, which is

organized and incorporated in this state under and in accordance with Ch. 617, F. S., which, upon organization and incorporation, purchases real estate upon which to construct needed school buildings, constructs such buildings, procures required equipment and facilities, hires a faculty, and opens a school plant and puts it in operation, at what point does such property become tax exempt?

In *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304, the court remarked that §1, Art. IX and §16, Art. XVI, of the State Const., "must be construed as a limitation upon the power of the legislature to provide for exemption from taxation of any classes of property except those particularly mentioned classes specified in the organic law." (See also *Maxcy Inc., v. Federal Land Bank*, 111 Fla. 116, 150 So. 248, text 250; *State v. St. John*, 143 Fla. 544, 197 So. 131, text 134; *Franks v. Davis*, Fla., 145 So. 2d 228, text 231; *Lanier v. Tyson*, Fla. App., 147 So. 2d 365, text 374). These authorities hold that tax exemptions, except those specially provided for by the state constitution, must be of real and personal property in this state "held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes," and except as to property held by the U. S. and the state of Florida and their governmental agencies for governmental purposes.

The actual operation of a college, such as New College, Inc., a Florida corporation, for educational purposes would seem to entitle its property so used to tax exemption. Colleges may also qualify for tax exemption as to property used for scientific purposes, literary purposes and charitable purposes. It is not the educational institution that is entitled to tax exemption, but its property held and used exclusively for religious, scientific, educational, literary or charitable purposes. (*University Club v. Lanier*, 119 Fla. 146, 161 So. 78, text 79). It is not the corporate character that determines the exemption, but the use of the property upon which the exemption is claimed. (*State v. Doss*, supra). The utilization of the property is the criterion in determining its liability or nonliability for taxes (*Riverside Military Academy v. Watkins*, 155 Fla. 283, 19 So. 2d 870, text 871).

To be tax exempt property of a college or other educational institution must be held and used exclusively for some religious, scientific, educational, literary or charitable purpose, or two or more of such purposes. This brings us to the question of when, under the facts set out in the above question, does the property in question become entitled to tax exemption. It is clearly entitled to the exemption when the educational plant is in full operation. Is the construction of the educational buildings and facilities and the making of the same ready for the actual operation of the educational institution or college use for an educational purpose?

By way of example, let us consider a newly organized and established educational institution, at the college level, which has obtained sufficient finances to purchase required real property for a college campus and other needed facilities, and has used its funds in acquiring such real property and other facilities and equipment for the operation of an educational institution; including the letting of contracts for the construction of needed buildings and facilities, to be completed and ready for use within a reasonable time and will, upon completion, be put to use as a college educational plant. This leads to the question of whether such an institution, in the process of building a college plant and equipping the same, may be classified as

an educational institution, entitled to tax exemption, before it has established classes and student activities and is actively engaged in educational duties, activities, and functions on the school premises.

In *Johnson v. Sparkman*, 159 Fla. 276, 31 So. 2d 863, text 865, the court remarked that "property exempt from taxation under the constitution for charitable and educational purposes has reference only to such property as is dedicated to the public and *used exclusively* for that purpose, or to such extent as Section 192.06, Florida Statutes, defines. Mere incidental use for such purposes is not enough." In *Miami Battlecreek v. Lummus*, 140 Fla. 718, 192 So. 211, text 216, it was held that for property in this state to be entitled to tax exemption it must be "*held and used exclusively* for a purpose or purposes recognized by our constitution and laws as being exempt." From these, and other Florida cases, and under the provisions of §1, Art. IX, and §16, Art. XVI, State Const., we must conclude that for property used for educational and similar purposes it must be held and used exclusively for such purposes, or one or more of the other purposes mentioned in said constitutional provisions. It is stated in 84 C. J. S. 558, §282, that "under laws expressly or impliedly making exemption (from taxation) dependent on actual use for charitable purposes, buildings intended for, but not in, charitable use are not exempt, and, accordingly, exemption has been denied with respect to buildings in the course of construction, or completed but not yet in actual use." In 84 C. J. S. 576, §287, the author states that "exemption ordinarily extends only to such property of an educational institution as is actually used for its proper educational purposes." (Emphasis supplied.)

This brings us to the question of whether or not real property is being *used for educational purposes* when its owner, an educational institution, is in the process of constructing educational buildings and facilities on such property definitely dedicated to educational use as soon as completed; to be entitled to the exemption must the institution be actually holding classes on the premises held by it for educational purposes. In *Hedgecroft v. Houston*, 150 Tex. 654, 244 S. W. 2d 632, a hospital association or corporation had been organized which, with funds raised by it, purchased suitable land for a hospital and clinic, and began the construction of a hospital and clinic building thereon suitable for and intended to be used as a hospital and clinic. The city of Houston, Texas imposed an ad valorem tax against said lands, on the theory that they were not being used as a hospital or clinic, and could not be so used until completion of the building and its opening as a hospital and clinic. The supreme court of Texas held the said property tax exempt, not only during the period of actual operation, but also for the period of actual construction. In the language of the court (supreme court of Texas) there was made the "valid argument that ownership with mere intentions, well grounded plans and hopes, cannot confer the exemption, in other words the intention to use, without use, is not sufficient. But according to the allegations of the petition there was more than mere intention to use. Petitioner was engaged in acts appropriate and necessary to bring the property into proper condition for operation in the performance of its charitable purposes." The court held the hospital property entitled to the tax exemption claimed.

In *Re. Thomas S. Clarkson Memorial College of Technology*, 272 App. Div. 732, 87 N. Y. S. 2d 491, text 492 (affirmed in *People v. Haggett*, 300 N. Y. 595, 89 N. E. 2d 882) the college was in the process of repairing, remodeling and making ready for occupancy as

living quarters for members of the college faculty, staff and students, certain property owned by the college not then in actual use. The college claimed that this property was tax exempt. But the taxing authority claimed that the property was subject to taxation because "the owner had failed to make proof of actual use of the property for" educational purposes. Holding the said property to be tax exempt, the court said that "if the subsequent use created a tax exempt status then the use which was confined to readying them for such purpose was likewise entitled" to the tax exemption. In *Holy Trinity Protestant Episcopal Church v. Bowers*, Tax Commissioner, 172 Ohio St. 103, 173 N. E. 2d 682, the question before the court was whether a vacant lot purchased by a church organization was entitled to exemption when purchased for the purpose of constructing a house of worship for the years in which fund raising and plan preparations were in progress and in which construction thereof was commenced. It appears that the church was "actively working toward an actual use of such property for a house of worship." This was a four to three decision. To the same effect see also *Good Samaritan Hospital Association v. Glander*, 100 Ohio St. 507, 99 N. E. 473. In *State v. Second Church of Christ*, 185 Minn. 242, 240 N. W. 532, cited with approval in *Village of Hibbing v. Commissioner*, 217 Minn. 528, 14, N. W. 2d 923, text 926, 156 A. L. R. 1294, the court held that "a site acquired by a church corporation upon which it intended to erect a new church within a reasonable time, under the supervision of an architect, was exempt from taxation as a church, church property or a house of worship 'at least from the time the architect is employed.'"

From the above authorities we conclude that in many states the construction of necessary housing and other facilities, by a religious, scientific, educational, literary or charitable institution, for carrying out their purposes, when done without delay and with all convenient speed, under the circumstances in each case, may be deemed the performance of a religious, scientific, educational, literary or charitable function, as a necessary preparation in the carrying out of their general functions. The taxing authority should require, as a condition to granting tax exemption, that the construction of such necessary housing and other facilities be carried out with dispatch and without delay.

Educational institutions which are organized and incorporated in this state under and in accordance with §617, F. S., and which, upon organization and incorporation, purchase real estate upon which to construct needed school buildings, construct such buildings, procure required equipment and facilities, hire a faculty, and open a school plant and put it into operation, are entitled to tax exemption from and after Dec. 31 of the year in which active construction of the needed buildings and facilities were commenced and prosecuted with due dispatch.

063-93—August 9, 1963

BOARD OF MEDICAL EXAMINERS

CONDUCT OF ADMINISTRATION HEARINGS—PROCEDURE;
EXAMINER—§§120.24(1), 120.25, 120.28, 458.121, F. S.

To: *Homer L. Pearson, Director, Florida State Board of Medical Examiners, Miami*

QUESTIONS:

1. May the medical board delegate to a panel consisting of three of its members the following duties: take testimony at administrative hearings, make findings of fact, and submit a recommended order to the board under applicable statutes?

2. Is it proper for a member of the board, who presided at the administrative hearing, sitting with the board when it renders its final order in the same case in which he presided as the hearing officer?

AS TO QUESTION 1:

The medical practice act, §458.121(2), F. S., provides that all charges shall be heard by the medical board. However, the administrative procedure act, §120.24(1), F. S., authorizes administrative hearings to be conducted by the following:

All hearings shall be presided over by the agency, or by a member of the agency, or by a hearing examiner supplied by the agency, who shall be competent by reason of training or experience.

Section 120.24(1), F. S., qualifies those authorized to *preside* at administrative hearings. Section 120.25 F. S. *empowers* those qualified to *preside* by §120.24(1), *supra*, to dispose of various procedural requests in advance of the hearing, make findings of fact, and submit a recommended order to the agency. Where an administrative hearing is not conducted before the agency, the above provisions only authorize a "hearing examiner" or "a member of the agency" to *preside* at the hearing and exercise the enumerated powers. Where the legislature designates a statutory procedure for the conduct of a hearing, it should be observed by an administrative board or agency. See 1 Fla. Jur., Administrative Law, §71. It is my opinion therefore, that where the medical board desires to delegate responsibility for the taking of testimony at an administrative hearing, it should designate one of its members to conduct the hearing, dispose of other procedural requests, make findings of fact, and submit a recommended order to it. Delegation of this responsibility to one of its members would not preclude other members of the medical board from attending and participating in the administrative hearing. The above provisions of the administrative procedure act were enacted to relieve administrative boards and agencies of time, effort, and energy consumed in taking testimony at administrative hearings rather than for the benefit of one charged before the board. Under a hearing officer system, members of an administrative board may delegate the task of taking the testimony to another but cannot abdicate their responsibility for *final determination* of the matter and entry of a proper order.

AS TO QUESTION 2:

May a member of the board, who presided at the administrative hearing, sit with the board when it renders its final order in the same case in which he presided as the hearing officer?

Section 120.28, F. S., provides:

No hearing examiner shall, in any proceeding where he presided as hearing examiner or a factually related proceeding, participate or advise the agency in entering its order except through his recommended order.

Section 120.24(1), F. S., qualifies either "the agency," "a member of the agency," or "a hearing examiner" to conduct an administrative hearing. *Eo nomine*, §120.25 F. S. empowers the hearing officer to dispose of procedural requests, make findings of fact, and submit a recommended order to the agency. The separation of func-

tions prohibition contained in §120.28 (above quoted) is addressed only to a "hearing examiner," and therefore does not apply to a hearing officer who is a member of the agency. The same interpretation is placed on the federal administrative procedure act. See *Wong Yang Sung v. McGrath*, 70 S. Ct. 445, 339 U. S. 33, 94 L. Ed. 616. The fact that a hearing officer or the agency of which he is a hearing officer or member acts in the nature of an investigator, prosecutor, witness, and judge or fact finder does not render the hearing unfair. 73 C. J. S., Public Administrative Bodies and Procedure, §135, p. 461.

It is my opinion, therefore, that a member of a board who presides at the administrative hearing may sit with the board and participate with it in rendering its final order in the same case in which he presided as hearing officer. The same is true for other members of the medical board who attend the hearing.

Your questions are answered accordingly.

063-94—August 9, 1963

LEGISLATION

EFFECTIVE DATE OF CH. 63-555—§28, ART. III, §§16 AND 18, ART. III, STATE CONST.; §§112.05, 122.10, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Your letter of the 8th poses the question of the effective date of Ch. 63-555, which became a law without the governor's signature. The records of the secretary of state show that this act was filed in that office on July 10, 1963. This act was identified in the legislature as senate bill 1023, and, according to legislative records was filed in the governor's office on June 13, 1963, said date being a Thursday. The legislature adjourned on June 19, 1963. Under §28, Art. III of the State Const., the governor had 5 days (Sundays excepted) within which to take action on the said bill or, in fact, in this particular case, 6 days as a Sunday intervened, which did not expire until the end of said June 19, 1963. Therefore, the legislature by its adjournment during June 19, 1963, and prior to the end of said day, left the bill on the governor's desk so that his time for action on the said bill became 20 days from the adjournment of the said legislature, or including July 9. Said Ch. 63-555 became a law, not having been acted on by the governor within the said 20 days, with the beginning of July 10, 1963.

Section 11 of said Ch. 63-555 provides that this act shall become effective July 1, 1963. This was 9 days prior to the time said Ch. 63-555, became a law. The fact that the effective date, as stated in the said act, is several days prior to the time the said act became a law presents the problem of the actual effective date thereof. If the said act is to take effect on July 1, 1963, a date prior to the date it became a law, it will in effect be a retroactive or retrospective law, which is a law which looks backward and contemplates the past, one which is made to affect acts or facts occurring, or rights accruing, before it came into force. (*Black's Law Dictionary*). A statute operates prospectively unless the intent that it operate retroactively or retrospectively is clearly expressed therein or by other law (*State v.*

Green, Fla., 101 So. 2d 805, text 807; *Larson v. Independent Life and Accident Ins. Co.*, Fla. 29 So. 2d 448; 82 C. J. S. 891, §414). "It is a well settled and fundamental rule of statutory construction, variously stated, that all statutes are to be construed as having only a prospective operation, and not as operating retrospectively. . . . Whether a statute operates prospectively, retrospectively or retroactively is a matter of legislative intent. . . . More specifically, statutes generally will be held to operate prospectively unless the purpose and intention of the legislature to give them a retrospective effect clearly appears." (82 C. J. S. 981-985, §414). In cases of doubt, the doubt should be resolved against the retrospective effect and in favor of the prospective construction only (82 C. J. S. 989 and 990, §414).

"Where the legislature fixes an effective date for a statute, but the statute is not approved until after such date, the effective date clause becomes void by reason of such circumstances, and the act goes into effect at a date subsequent to that fixed" (82 C. J. S. 963, §400). See also to the same effect *Robey v. Broersma*, 181 Md. 325, 146 A. L. R. 687, 29 A. 2d 827, text 831; *In Re: Borough of Sharpsburg*, 163 Pa. Super. 84, 60 A. 2d 557, text 559; *Portland Pendleton Motor Transport Co. v. Heltzel*, 197 Or. 644, 255 P. 2d 124. We find no contrary cases. In the light of the above and foregoing we are of the opinion that Ch. 63-555, became effective, under §18, Art. III of the State Const. 60 days after the 1963 regular session of the Florida legislature adjourned on June 19, 1963.

We find nothing in said Ch. 63-555, including §7 thereof, evidencing an intention to make the said act, or said §7, retroactive or retrospective to July 1, 1963, or any other date.

Section 16, Art. III of the State Const. provides in part that "each law enacted in the legislature shall embrace but one subject, and matters properly connected therewith, which subject shall be briefly expressed in the title. . ." The title to said Ch. 63-555 is "an act relating to retirement; making amendments in Chapter 122, Florida Statutes, relating to the state and county officers and employees retirement system; making special provisions for sheriffs and certain full time deputy sheriffs performing high hazard duties; making special provisions for persons becoming members on or after July 1, 1963; making provision for subsequent modification of the findings; providing an appropriation beginning in 1967; and providing an effective date." No mention is made of an amendment of §112.05, F. S., which §7 of the said act purports to amend and renumber as §122.10 (3), F. S. Section 112.05, F. S., appears to be more in the nature of a pension than a provision for retirement. These observations seem to cast doubt on the validity of said section 7 and the amendment made thereby, upon constitutional ground under §16, Art. III of the State Const. However, it has long been the policy of this office not to hold acts of the legislature or statutes and laws of the state unconstitutional, but to leave their constitutionality to the courts. We, therefore, do not pass upon the constitutionality or unconstitutionality of said §7 of Ch. 63-555.

063-95—August 9, 1963

PER DIEM AND TRAVEL EXPENSE

DEFINITION OF "CONVENTION" AND "CONFERENCE" AS USED IN §112.061, F. S., AS AMENDED BY 63-400, LAWS OF FLORIDA

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What is the difference between the terms "convention" and "conference" as used in §112.061(6)(a) and (b), F. S., as amended by Ch. 63-400?

It is provided in said §112.061(6)(a) and (b), F. S., as amended by §1, Ch. 63-400, that persons traveling within and without the state of Florida shall be allowed subsistence pay at the rate mentioned in said paragraphs, when on "official business to attend a *convention* or conference which will serve a direct public purpose with relation to the public agency served by the person attending such meeting," that is, convention or conference. Although several words and phrases used in said §112.061, F. S., as amended aforesaid, are defined in subsection (2) of said section, no definition is given of the terms "convention" and "conference" as used in said §112.061(6)(a) and (b) as amended. We must, therefore, determine the meaning of the terms "convention" and "conference" as used in said §112.061.

The term "convention" is defined in the World Book dictionary as "a meeting for some purpose, gathering, assembly. A political party holds a convention to choose candidates for public office and adopt a platform. Businessmen attend conventions to learn new developments and products," and in 18 C. J. S. 39, that "in the United States the term as employed in common usage in statutes, political history and civil government means and implies a representative gathering or assemblage." In Advisory Opinion, 132 Me. 491, 167 A. 176, an assembly of the representatives of a group of people was deemed a convention. In *State v. Johnson*, 18 Mont. 548, 46 P. 533, 34 L. R. A. 313, it was said that a convention was a representative body; an organized representative body. In *Peters v. Superior Court*, 70 Wash. 662, 127 P. 310, text 312, it was held that an organized body assembled for the purpose of making a nomination, constituted a convention. In Webster's dictionary, the term is defined as a "body or assembly of persons met for some common purpose." A group of delegates assembled for the purpose of accomplishing some purpose as representatives of others has been deemed a convention (see the definition of "convention" in 9 A Words and Phrases, Perm. Ed., 116-118). We conclude that a convention is the assembly of a group of persons representing persons and groups, coming together for the accomplishment of a purpose of interest to a larger group or groups.

The term "conference" is defined in Black's Law Dictionary as a "meeting of several persons for deliberation, for the interchange of opinion, or for the removal of differences or disputes." In *Re: Joint School District No. 2*, 15 Wis. 2d 517, 113 N. W. 2d 141, the court said that a "conference" means something less than a meeting at which a quorum . . . must be present." In *Rutland Railway Corp. v. Brotherhood of Locomotive Engineers*, CCA 4th, 307 Fed. 2d 21, text 40, it was held that a *conference* within the railway labor act refers to activity of a type similar to negotiation, but requiring a lesser output of time and energy. The definition of "conference" in

15 C. J. S. 819 is substantially the same as the one in Black's Law Dictionary. In *State v. Clemmons*, 153 Cal. App. 64, 314 P. 2d 142, text 146, the court defined a round table conference as "a meeting of a group for discussion, deliberation, and decision upon questions of mutual interest, a sort of debate where no precedence in rank can be indicated, for the purpose of free discussion." In Webster's dictionary, a conference is defined as the act of consulting together formally; serious conversation or discussion; interchange of views; a meeting for consultation; discussion or interchange of opinions whether of individuals or groups. We conclude that a conference is the coming together of persons with a common interest or interests for the purpose of discussing their common problems and interests.

Where the head of a state department, office or agency calls together the personnel of his department, office or agency for the discussion and study of their common problems or interests, such a gathering or meeting, would not appear to be either a convention or conference; the same would be true of a gathering of the personnel of a district or area office of such department, office or agency. Where the head of a state department, office or agency calls together his departmental personnel from sections of the state for interoffice discussion and consideration, such a gathering would not appear to be either a convention or a conference.

Where department, office or agency of the state calls together personnel from other departments, offices or agents, for example, a request by the comptroller to the fiscal agents of other departments, offices and agencies of the state, such a gathering would appear to be a conference within said §112.061(6)(a) and (b), F. S., as amended by Ch. 63-400.

Gatherings of the governors, attorneys general, tax administrators, etc., for the holding of their national conventions appear to be conventions within the purview of said §112.061(6) (a) and (b), F. S., as amended.

Ordinarily, a trip by director and attorney for the legislative council to confer with Mr. Chappell concerning the impeachment case, or Mr. Chappell with them, would not be a convention or conference within the terms of §112.061, F. S., as amended.

Contacts of this kind between public officers and employees for the discharge of an item of public business do not reach the proportions of conventions and conferences contemplated by the statute. What we believe the legislature had in mind were those more formal or important meetings of public officers or employees where they come together in their official associations or hold group meetings of an exceptional nature and official programs, panel discussions and group clinics are involved. We think that the legislature did not draw too great a distinction between its use of the words "convention" or "conference" but that its use of these terms was practically synonymous or interchangeable. The word "conference" has been extended in its use by popular application to refer to a meeting that formerly would have been called a convention. As used by the legislature, we think the term "conference" more closely connotes a convention or larger formal group meeting than a discussion or contact of a smaller group which is not programmed or scheduled as an annual meeting or a special or extraordinary meeting where there are a large number of participants for an overall clinical discussion of a governmental problem or problems.

063-96—August 9, 1963

CONSTABLES

SERVICE OF PROCESS; FEES—CH. 63-41, LAWS OF FLORIDA; §§30.23 AND 30.231, F. S.

To: Ernest Ellison, State Auditor, Tallahassee

QUESTIONS:

1. Are the flat fees for service of certain summons or writs in civil cases provided in Ch. 63-41 applicable to a constable?

2. If the answer to question 1 is affirmative, is the constable required to remit said fees monthly to the county as provided in §2 of Ch. 63-41, even though his office is operated under the fee system as opposed to the budget system?

AS TO QUESTION 1:

Chapter 63-41, effective July 1, 1963, provides a flat fee of \$5 to be charged in civil cases for *each service of a summons or a writ*, except witness subpoenas shall be \$3.50 for each witness subpoenaed. The fees established by said chapter supplant the civil fees for service, mileage, copy and return, otherwise provided in §30.23, F. S.

Significantly, §1 of said chapter contains a proviso to the effect that fees now being collected in any county under special act shall not be affected by said chapter. Section 2 of said chapter provides that all fees collected under its provisions shall be paid in the fine and forfeiture fund of the county monthly.

It is well settled in this state that the legislative intent must be determined by consideration of the purpose of the act under consideration. *Realty Bond and Share Co. v. Englar*, 143 So. 152, 104 Fla. 329.

The intent of a valid statute is the law, and is ascertained by consideration of language of purpose of the enactment. *Watson v. Holland*, 20 So. 2d 388, 155 Fla. 342. Motion denied. 65 S. Ct. 1408, 325 U. S. 839, 89 L. Ed. 1965. The primary purpose designated in the statute should determine the force and effect of the words used in the statute, and no literal interpretation should be given that leads to an unreasonable or ridiculous conclusion for a purpose not designated by the lawmakers. *Smith v. Ryan*, 39 So. 2d 281.

AS TO QUESTION 2:

From the language of §§1 and 2 of Ch. 63-41, it would appear that the purpose of the act is to establish a flat average fee in connection with the service of process etc., as distinguished from the former procedure of determining the total fee for service of process by addition of the several fees afforded for various activities of a sheriff or other officer in connection with service of process as set out in §30.23 F. S. and further that all fees collected should be paid into the fine and forfeiture fund of the county on a monthly basis. It would appear that the legislature contemplated this procedure in light of the sheriffs' budget system, because, pursuant to the provisions of §2 thereof, it does not appear that the fees collected are to be considered as income of the office.

This interpretation is in keeping with a prior construction, which we have placed on said chapter in AGO 063-75, to wit, "I am of the opinion that the flat fee provided by Section 1 of Chapter 63-41 is earned upon completion of the service of a summons or writ or a

witness subpoena, as the case may be. In those counties where, because of applicable special acts, the sheriff operates his office on the fee system, it would appear that the proviso of Section 1 would make the flat fee authorized by said Section inapplicable to the sheriff's fee for service of civil process in such counties. Since Section 30.23 F. S. has not been expressly repealed the fees provided for service of civil process in said Section obtain in such counties."

As to the fees of the constable for service of process, I am of the opinion that in those counties where a constable continues to operate his office as a fee officer as distinguished from a salary officer with all fees which he collects payable to the county, the provisions of Ch. 63-41, would be inapplicable.

063-97—August 14, 1963

TAXATION

UNREGISTERED BOATS, VESSELS, DREDGES, BARGES, ETC.—CH. 63-550, LAWS OF FLORIDA; §§200.01, 330.06; CHS. 370, 372, PART II, CH. 371, F. S.; §13, ART. IX, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Are boats and vessels registered, enrolled or licensed under the laws of the U. S., subject to ad valorem taxes in the light of §200.01, F. S., as amended by §6, Ch. 63-550?

2. Are boats, vessels, dredges, barges, etc., not subject to licenses and license taxes under §7, Ch. 63-550, subject to ad valorem taxes in the light of §200.01, F. S., as amended by §6, Ch. 63-550?

Chapter 63-550, is concerned with two things; first, the exemption from ad valorem taxes of boats and vessels and second, a schedule of taxes for boats and vessels.

As to exemption from taxation, §2, Ch. 63-550, provides in part as follows: "all boats and vessels hereinafter described propelled in whole or in part by motor or sail either inboard or outboard, are hereby declared to be *motor vehicles*." Section 3 provides: "'vessel' is synonymous with 'boat' as used in this act and means a motor or artificially propelled vehicle as property and defined in Article IX. Section 13 of the Constitution of Florida of every description of watercraft and air boats, other than a seaplane on the water, propelled by motor or sail, and designed for navigation and used or capable of being used as a means of transportation on water." Section 4 provides "*all boats and vessels and outboard motors capable of propelling any such boat or vessel shall be exempt from any personal property tax and in lieu thereof shall pay a boat registration certificate tax.*"

An examination of the above reveals that the 1963 legislature has in the broadest possible language exempted from ad valorem taxes all boats and vessels. In doing so it used practically the same language previously used in exempting aircraft. The 1955 legislature enacted §330.06, F. S., which treated aircraft as motor vehicles for the purpose of tax exemption under §13, Art. IX, State Const. This specifically was approved by the supreme court of Florida in the case of *L. B. Smith Aircraft Corp. v. Green*, (Fla.), 94 So. 2d 837. In view

of the fact that the supreme court has approved the legislative classification of aircraft as motor vehicles, I see no objection to the legislature exempting boats and vessels as motor vehicles. In Florida where boats are used so extensively for transportation and carriage, it would seem entirely reasonable to place boats and vessels in the category of motor vehicles. It appears logical that if the legislature can treat motor vehicles operating on land and aircraft operating in the air as motor vehicles and therefore having exempt status from ad valorem taxes under §13, Art. IX, State Const., it can likewise treat watercraft operating on water as being within the same class.

The other subject matter of Ch. 63-550, relates to a tax schedule for certain motorboats. Motor boat is defined in §3 of the act as meaning any undocumented boat or vessel powered by machinery of more than 10 h.p. and §8 requires the owner thereof to pay the appropriate registration fee, depending on the length of the boat. The definition "motor boat" clearly precludes any registration of federally documented boats and boats powered by 10 h.p. motors or less. See AGO 063-78, dated June 19, 1963.

Commercial boats must be licensed under Chs. 370 and 372, F. S., and are specifically relieved from further registration under §7, Ch. 63-550.

Thus, all boats and vessels have been classified by the legislature as motor vehicles and therefore exempt from ad valorem taxes under §13, Art. IX, State Const. Commercial boats must continue to register under Chs. 370 and 372, F. S. Undocumented non-commercial boats powered by motors in excess of 10 h.p. must be registered and pay the fee according to the length of the boat as set out in §7, Ch. 63-550.

Both your questions are therefore respectfully answered in the negative.

063-98—August 12, 1963

SHERIFFS

FEES FOR SERVICE OF WRITS—CH. 63-41, LAWS OF FLORIDA; §30.231, F. S.

To: *M. J. Daffin, Sheriff, Panama City*

QUESTIONS:

What is the sheriff's fee in connection with:

1. Service of:

- (a) Rules to show cause and other orders of court which may be classified as "writs of court";
- (b) Notices of hearing and other papers that are not properly classified as a summons or writ?

2. Service of summons where:

- (a) There are multiple defendants;
- (b) Where multiple defendants live at the same address?

3. Service of notice of hearing or restraining order when served at the same time as the summons and copy of complaint?

AS TO QUESTION 1:

A writ is defined as a precept in writing, couched in the form of a letter, running in the name of the king, president, or state, issuing from a court of justice, and sealed with its seal, addressed to the sheriff or other officer of the law, or directly to the person whose

action the court desires to command, either as the commencement of a suit or other proceedings or as incidental to its progress, and requiring the performance of a specified act, or giving authority and commission to have it done. Black's Law Dictionary, 3d Ed. See particular writs as defined in Words and Phrases, Vol. 45, p. 576, etc.

Section (1), Ch. 63-41 (§30.231(1), F. S.) among other things provides that "In all counties of this state the *fee charge in civil cases for each service of a summons or writ*, except witness subpoenas and executions, shall be five dollars (\$5.00)." (Emphasis supplied.)

Inasmuch as the legislature has not defined or limited the word "writ" as appears in said §1, I am of the opinion that the flat service of process fee of \$5 would be earned by the sheriff upon the completion of each service of process, viz., writs of court, as above defined.

It is well settled in this state that a public official has no legal claim for official services rendered, except when, and to the extent that, compensation is provided by law, and when no compensation is so provided for rendition of such services, is deemed to be gratuitous. *Gavagan v. Marshall*, 33 So. 2d 862, 160 Fla. 154. Significantly, said section fails to provide a fee for service of process in those situations where the sheriff or other officer attempting service is unable to effect such service, hence, the flat fee provided by this section is inapplicable under such circumstances. Because Ch. 63-41 does not expressly repeal the provisions of §30.23 F. S., I am of the opinion that as to those acts performed by the sheriff, in connection with a service of papers other than a summons or writ as above defined, or the service of a witness subpoena, the fees provided by said §30.23 are still applicable. Question 1 is answered accordingly.

AS TO QUESTION 2:

Section 1, Ch. 63-41, establishes the flat service of process fee of \$5 to be charged *in civil cases for each service of a summons or writ*. Because of the clear expression of the legislature that the fee is to be charged for each service of a summons or writ, I am of the opinion that in connection with those cases involving multiple defendants, the sheriff would be entitled to the \$5 fee for service of a summons or writ on each individual defendant, notwithstanding that several defendants may reside at the same address.

AS TO QUESTION 3:

I am of the opinion that where a restraining order issued by a judge before whom a proceeding is pending is served at the same time as a summons and copy of the complaint, the sheriff would be entitled to a fee of \$5 for the service of summons and additional fee of \$5 for the service of such restraining order, since such paper would be classified as a writ as defined above.

The sheriff's fee in connection with the service of a notice of hearing would be as indicated above in the answer to question 1.

063-99—August 12, 1963

JUVENILE COURT

WAIVER OF JURISDICTION—CONSTRUCTION OF
§§39.02(1) AS AMENDED BY CH. 63-12, LAWS OF
FLORIDA, AS TO CAPACITY OF JUVENILE
TO COMMIT CRIME—§39.03(5), F. S.

To: W. A. Milton, Jr., County Judge, Tavares

QUESTION:

Where a juvenile judge, acting pursuant to the au-

thorization of §39.02(1), F. S., as amended in 1963, waives jurisdiction and certifies a case against a juvenile to a municipal court or other court which would have jurisdiction if the child were an adult, does the child become subject to imprisonment the same as an adult would be?

Chapter 63-12, added the following proviso to §39.02(1), F. S.:

... provided, however, if the judge shall find that any child brought into juvenile court who, if an adult, would be charged with violating a federal law, state law, or city ordinance relating to the operation or use of a motor vehicle, the judge may enter an order waiving jurisdiction and certifying the case to the court which would have jurisdiction of the child if the child were an adult, and thereafter the child shall be subject to the jurisdiction of the other court as if the child were an adult.

It will be noted that when a juvenile judge enters an order waiving jurisdiction and certifying the case to another court which would have jurisdiction if the child were an adult, said provision stipulates that "thereafter the child shall be subject to the jurisdiction of the other court as if the child were an adult." This means that, insofar as the imposition of sentence is concerned, such a child may be treated as an adult by the court to which his or her case is certified; if a sentence to imprisonment could be imposed on an adult, it could likewise be imposed on such a child. Therefore, your question is answered in the affirmative.

However, I think it well to suggest that caution should be exercised in the matter of transferring cases against children to trial courts for trial, since under the common law rule, which is in force in Florida, children of certain ages are presumed to be incapable of committing crimes. I quote from *Clay v. State* (Fla.), 196 So. 462, text 463:

... It is well established at common law that a child under the age of 7 years is conclusively presumed to be incapable of committing a crime; the common law rule raises a presumption of incapacity of an infant between the ages of 7 and 14; and the presumption is that the incapacity after 7 years of age decreases with the progress of his years. ... I also quote from 43 C. J. S. 216-217, Infants, §96d(1)b:

At common law, the time of infancy is usually regarded as divided into three distinct periods as to which distinct presumptions of capacity or incapacity prevail. Thus, an infant under the age of seven is conclusively presumed to have no capacity to commit a crime. Between the ages of seven and fourteen there is a presumption in favor of his incapacity, but such presumption is merely prima facie and rebuttable, and varies in strength with the age of the infant, decreasing in strength as the infant increases in years. On the other hand, after fourteen years of age, he is presumed to be capable of committing crime and of being responsible therefor in the same manner as in the case of an adult, although the presumption is subject to proof as to the real fact.

Whenever a juvenile judge is faced with the problem of determining whether to transfer a case against a child between 7 and 14 years old to another court for trial, he will, of course, wish to be reasonably well satisfied that such child is capable of committing the offense charged against him. Even if an order of transfer should be made, the

prosecution in the trial court would have the burden of overcoming the presumption that a child between 7 and 14 years old is incapable of committing crime. To that effect, I quote from 43 C. J. S. 217, Infants, §96d(1)b:

Burden of proof. When the presumption of capacity or incapacity is rebuttable, the burden of proof is on the person asserting the contrary to the fact presumed. Thus, where a prima facie presumption of incapacity exists, the burden of proving capacity is on the prosecution. . . .

Furthermore, if a case against a child is transferred to a trial court under the authorization of said statute, and if the trial court imposed a sentence to imprisonment, I think that the following provisions of §39.03(5), F. S., should be observed:

(5) Whenever a child shall, pursuant to order of the judge, be delivered over to any jail, the child shall, in every case without exception, be placed and kept in a part of the jail entirely separate and apart from adult inmates.

063-100—August 12, 1963

TAXATION

LIQUEFIED PETROLEUM GAS—CONSTRUCTION AND APPLICATION OF §203.01, F. S.—UTILITIES, ETC. CH. 203, F. S.

To: *Florida Revenue Commission, Tallahassee*

QUESTIONS:

1. Is liquefied petroleum gas, which is used for cooking and heating, and supplied from outside the building of the user, subject to taxation under Ch. 203, F. S., when sold in liquid form to the consumer?

2. When the same form of gas is supplied to users in gas form, is it subject to the said tax?

3. Is said Ch. 203, F. S., limited in its application to sales by public service corporation?

4. Are liquefied petroleum gases classified as natural or manufactured gases?

This office, by its opinion of April 1, 1950, being AGO 050-168, answered question 1 in the negative and question 2 in the affirmative. We shall reconsider the first 2 questions and consider questions 3 and 4 for the first time.

Section 203.01, F. S., provides that "every person, including municipal corporations, receiving payment for . . . natural or manufactured gas for light, heat or power . . . shall annually, on or before the fifteenth day of March, report to the comptroller of the state, under oath of the secretary or some other officer of such person, the total amount of gross receipts derived from business done within this state . . . and, at the same time, shall pay into the state treasury the sum of one dollar and fifty cents upon each one hundred dollars of such gross receipts." This provision first appeared as §1, Ch. 15658, 1931, the title of which, insofar as here material, is "an act imposing a tax on all corporations, firms and individuals receiving payment for . . . natural and manufactured gas for light, heat and power . . ." Sales to public utilities, including municipal corporations and rural electric cooperative associations, either for resale or for use as fuel, are exempted from the said tax. (Emphasis supplied.)

The tax imposed by said §203.01, F. S., is an excise tax and not an ad valorem tax (*Jacksonville Gas Co. v. Lee*, 110 Fla. 61, 148 So. 188). This tax was treated as a gross receipts tax in *Lakeland v. Amos*, 106 Fla. 873, 143 So. 744). This section does not authorize the collection of the tax on a product which was liquid when sold, but was transferred into a gas and used for fuel for cooking and light when released from the container which held a liquid and not a gas. (*Lee v. Wood*, 126 Fla. 104, 170 So. 433). This case does not exclude the sale of a gas, already gassified from a liquefied combustible gas.

Liquefied petroleum gas, which is also known as L. P. gas, bottled gas, tank gas, etc., is generally understood to be the commercial grade of propane and normal butane gases, which is applied to certain hydrocarbons found in crude oil, natural gas, and refinery gas. It is fuel made up principally of butane and propane gases, or a mixture of the two, both of which turn to a liquid when put under pressure. Propane and butane gases are found in the earth along with natural gas and crude oil from which they are separated by various commercial methods. (*Encyclopedia Americana*; *World Book Encyclopedia*. The U. S. Court of Appeals, 5th Circuit, in *Deep South Oil Co. of Texas v. Federal Power Commission*, CGA 5th, 247 Fed. 2d 882, text 888, stated that "Boone's Petroleum Dictionary (1952) defines natural gas as a mixture of gaseous hydrocarbons found in nature in many places connected with deposits of petroleum, to which the gaseous compounds are closely related." In *Carbide & Carbon Chemicals Corp. v. Texas Co.*, DC Tex., 21 Fed. 2d 199, text 200, the court held natural gas to be a mixture of a number of hydrocarbons. In *Lone Star Gas Co. v. Harris*, Tex., 45 S. W. 2d 664, text 667, the court held that the term natural gas has reference to all its constituent elements. (Emphasis supplied.)

We have before us, in your file handed us by you with the request for opinion, a memorandum apparently furnished you by the Florida liquefied petroleum gas association, stating that liquefied petroleum gas "includes products composed of the following hydrocarbons or mixtures of them; propane, butane and butylenes. It exists in combination with other hydrocarbons as a liquid in its natural state." Webster's dictionary defines natural gas as consisting "chiefly of methane with small variable amounts of ethane, propane, butane, hydrogen, oxides of carbon, nitrogen, helium, hydrogen sulphide, etc., "which elements and compounds chiefly make up a natural gas, each said gas being a component of natural gas. The component parts of liquefied petroleum gas are extracted from natural gas, petroleum, etc., as gases naturally existing in or on the earth, and combined in portions unknown to us and when so combined and compounded constitute liquefied petroleum gas or gases.

The word "manufacture" has been defined as the production of articles for use from raw or prepared materials, by giving them new forms, qualities, properties or combinations, whether by hand labor or by machinery; also anything made for use from raw or prepared materials. (55 C. J. S. 669, §1). In the sense that propane, butane and butylene gases are taken or produced from natural gas or petroleum, further processed and used as raw materials in mixing or combining them, they constitute a manufactured gas, manufactured from the gases comprising it. Liquefied petroleum gases may, therefore, be classified as manufactured gases for the purpose of §203.01, F. S.

Liquefied petroleum gases being a mixture of propane, butane and butylene gases, which are component parts of the mixture known as natural gas, are natural gases in their own right. Although natural gas consists largely of methane, propane, butane and butylene gases,

which are likewise natural gases, said combination of gases usually comprises the natural gas usually sold for heating and lighting purposes. Each of these combustible gases is a natural gas and within the purview of §203.01, F. S., when sold in gas form for light, heat or power.

We find nothing in §203.01, F. S., which shows or indicates an intention to limit the taxes imposed thereby to payments received for the sale of electricity, natural and manufactured gas and telephone and telegraph services, by persons, firms and corporations regulated as a public utility. The language used in said §203.01, F. S., is "every person, including municipal corporations," receiving payment for electricity, *natural or manufactured gas*, and telephone and telegraph service, is broad enough to include every individual, firm, corporation, association, joint adventure, etc., (see §1.01, F. S.), whether qualified as a public utility or not.

In the light of the above and foregoing, the 4 questions above stated are answered as follows:

1. *Liquefied* petroleum gas which is sold and delivered to a purchaser in liquid, but not gas, form, is not within the purview of §203.01, F. S., and is not subject to taxation thereunder. Where such gas is billed to the purchaser through a meter measuring the same as a gas, instead of a liquid, it will be subject to the tax.

2. The tax being imposed on the sale of natural or manufactured gas, used for light, heat or power, and liquefied petroleum being within the purview of said §203.01, such gas, when used for light, heat, or power, when supplied and billed to the customer as a *gas or in gaseous form*, whether from outside of the building or not, is subject to taxation under §203.01, *supra*. The question of whether the liquefied petroleum gas vested in the customer as a liquid or a gas is material here.

3. Chapter 203, F. S., imposes a tax against all persons selling electricity, natural or manufactured gas, or telephone or telegraph service, whether operating as a public utility or not.

4. Liquefied petroleum gas as a whole appears to be subject to classification as a *manufactured* gas; but as to the several gases comprising it, each such gas appears to be a natural combustible gas within itself.

063-101—August 13, 1963

CRIMINAL PROCEDURE

SHERIFFS' FEES FOR SERVICE OF WITNESS SUBPOENAS IN CRIMINAL PROCEEDINGS—§30.51, F. S.

To: Wade H. Cobb, Sr., Sheriff, Milton

QUESTION:

May sheriffs charge fees to the county and/or the defendants for service of subpoenas to witnesses for either party in criminal cases?

Section 30.51(1), F. S., provides:

No bills shall be rendered to the county for any services, nor shall any fees, commissions, or other remuneration for official services as sheriff be paid by the board of county

commissioners of any county to the sheriff of the county except as provided by this section. *All fees commissions and other remuneration provided by law for services other than criminal shall be charged by the said sheriff to other authorities and parties* doing business with their offices and shall be paid over to the county as provided in this section. (Emphasis supplied.)

The above section operates as a prohibition against a sheriffs presentment of bills for his official services to the board of county commissioners and in addition, in unequivocal language, prohibits the board of county commissioners from payment of bills so presented. This section clearly recognizes the propriety of the assessment of sheriffs fees and commissions, as provided by law for services other than criminal, to *other authorities and parties doing business with their offices.*

Although the service of a witness subpoena on behalf of defendants in criminal proceedings occurs in connection with criminal matters before a court, there is serious doubt the service of such witness subpoenas can be classified as criminal services performed by the sheriff. Clearly the fees charged by sheriffs, prior to the enactment of the sheriffs budget law, for such things as arrests, commitment of a prisoner, release of a prisoner, etc., come within a classification of criminal services performed by the sheriff. We find no recognizable distinction between the service of a witness subpoena in civil or criminal actions. We believe both functions ministerial in nature and incapable of classification based upon the nature of the court proceeding in connection with which such service is made.

Hence, I am of the opinion that the fee of a sheriff for service of witness subpoenas in criminal proceedings is a proper charge to be paid by *solvent defendants* at whose request such service made.

Because of the prohibition of the above section against the charge for the sheriffs official services against the county, it is my opinion that the sheriff would not receive a fee for service of witness subpoenas where the cost of the proceedings involving insolvent defendants are *to be borne* by the county. See §§932.36, 932.37, 939.07, F. S., §9, Art. XVI, State Const.

In those several counties where, because of general laws of limited application (population acts), special or local acts of the legislature, the sheriff operates his office on the fee system, the foregoing comments pertaining to service of witness subpoenas in criminal proceedings involving insolvent defendants, would be inapplicable. In those instances in those counties, I am of the opinion that the sheriff's fee for service of witness subpoenas at the request of an insolvent defendant is a proper charge to be paid by the county as a part of the proceeding cost paid by the county on behalf of insolvent defendants.

063-103—August 13, 1963

TAXATION

LICENSES AND LICENSE TAXES—PRIVATE INVESTIGATIVE AGENCIES; WATCHMAN, GUARD OR PATROL AGENCIES—CH. 63-340, LAWS OF FLORIDA, (CH. 493, F. S.); §§205.52, 205.53, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What occupational licenses and license taxes are

applicable to those persons, firms and corporations regulated by Ch. 63-340, regulating private investigative and similar agencies and operators?

Chapter 63-340, regulates the business and operations of private investigative agencies, watchmen, patrolmen, guards, detectives, etc., and provides for the licensing thereof. The secretary of state is made the licensing agency for licensing the same. Requirements of applications for licenses are also provided in and by said chapter, as are licensing requirements, license fees, etc. Regulatory licenses required and issued under said chapter are valid throughout the state, including municipal corporations, and may not be required by counties, municipal corporations, etc., in addition to the state regulatory license. Section 20 of said Ch. 63-340 provides in part that in addition to said regulatory license persons otherwise subject to occupational licenses under other statutes and laws "shall be required to obtain a city and county occupational license in each city and county where he maintains a physical office."

Under these provisions, persons, firms and corporations who prior to the effective date of said Ch. 63-340 were required to obtain county and municipal occupational licenses are not relieved from such license and license tax requirements by said Ch. 63-340. Detectives have been required to obtain a license in Florida since 1913.

In *State v. Pendleton*, 7 La. App. 100, 119 So. 73, text 74, a Louisiana court of appeals held detective business to be a profession. "While the word 'profession' may be broadly defined as meaning a vocation, calling, occupation or employment, literally the term is applied to a calling or vocation requiring special knowledge of a branch of science or learning, and in this somewhat restricted sense the word 'profession' means an employment requiring a learned education as a profession of arms (military men), the profession of a clergyman, lawyer or physician, the profession of chemistry or physics." (72 C. J. S. 1216). The term "is now generally applicable to accountants, architects, chemists, editors, electricians, engineers, journalists, landscape architects and pharmacists." (72 C. J. S. 1219).

From the above and foregoing we conclude that private detectives and investigators should be classified as professionals and that investigative and detective agencies are professional groups, subject to occupational licenses and license taxes under §205.52, F. S. Watchmen, guards and patrolmen holding themselves out for employment as such do not appear to be professional people. They appear to be persons holding themselves out for performing some service for the public in return for a consideration so as to be within the purview of §205.53, F. S.

Watchmen, guards and patrolmen permanently employed by commercial and industrial institutions who do not hold themselves out for employment by others are a part of the personnel of the commercial or industrial institution employing them. An investigator or a detective employed by a commercial or industrial institution who is required under his employment contract to perform general investigative services for his employer, like an attorney, physician, dentist, etc., would nevertheless be engaged in a profession within the purview of §205.52, F. S. So long as an investigator or a detective performs general investigative or detective work for his employer, and is not in fact employed as a watchman, guard, or patrolman, or other nonprofessional duty or service, he is required to obtain an occupational license and pay the license fee required by §205.52, F. S. Only when a person is engaged in or is holding himself out for the performance of detective or in-

vestigative services generally will be deemed to be a professional person.

Watchmen, guards and patrolmen, as well as detectives and investigators not engaging in general investigative or detective work for their employer, who are employed by commercial and industrial institutions and engaged entirely in the performance of services for their employers would seem to be a part of their employer's organization and not within the purview of either §205.52 or §205.53, F. S. To be within the purview of either §205.52 or §205.53, F. S., a private detective or investigator or a guard, watchman or a patrolman must hold himself out for employment by persons, firms and corporations generally or be engaged in the profession of a detective or investigator.

From the above and foregoing we conclude that:

1. Private investigative and detective agencies and contractors engaged in their professions as investigators and detectives in this state are engaged in the practice of a profession within the purview of §205.52, F. S.

2. Private investigators and detectives engaged in the practice of their professions in this state are likewise engaged in the practice of a profession within the purview of said §205.52.

3. Watchmen, guards and patrolmen holding themselves out to the public and offering their services as such are engaged in the performance of services to the public within the purview of §205.53, F. S.

4. Private investigators and detectives employed by commercial and industrial institutions who do general detective and investigative services for their employers are practicing a profession in this state, otherwise not.

5. Private investigators and detectives employed by other private investigators and detectives, or by investigative and detective agencies or contractors, are engaged in a profession in this state when they are making investigations for their employers and are required to obtain licenses and pay license taxes under §205.52, F. S.

6. We construe §20 of said Ch. 63-340, as exempting those persons, firms and corporations within its purview from state occupational license taxes, but leaving county and municipal license taxes applicable to them.

7. It also appears that said §20 makes county and municipal licenses and license taxes dependent upon the maintenance of physical offices therein. Doing business within the county or municipality is no longer the applicable rule.

063-104—August 14, 1963

PUBLIC MONEYS

BONDS OF DEVELOPMENT COMMISSION AS SECURITY
FOR DEPOSITORIES OF PUBLIC MONEYS—§§18.11
136.02, 288.153, F. S.

To: E. O. Rolland, Executive Director, State Board of Administration, Tallahassee

QUESTION:

Are bonds or certificates of the Florida development

commission (or the Florida state improvement commission) required to be rated in one of the highest four classifications by established, nationally recognized, investment rating services in order for such bonds or certificates to be acceptable as legal investments and security for all public deposits, including those authorized by Chs. 18, 136, and 237, F. S.?

Chapters 18, 136 and 237, F. S., relate to the deposit of public moneys and make particular reference to the security to be given by banks qualifying as depositories of public moneys. Sections 18.11 and 136.02, recognize bonds or certificates issued by state agencies as acceptable security, provided that such "bonds or certificates herein mentioned shall be rated in one of the highest four classifications by established, nationally recognized, investment rating services."

Section 288.153, in referring to the bonds or certificates issued by the Florida development commission as legal investments and security, provides:

288.153 *Bonds or revenue certificates; legal investments and security.* — Subject to the restrictions and limitations of chapters 656-668 inclusive, and notwithstanding any other restrictions on investments contained in any law of this state, the state and all public officers, municipal corporations, political subdivisions and public bodies, all banks, bankers, trust companies, savings banks, building and loan associations, savings and loan associations, investment companies, insurance companies, insurance associations, and all persons carrying on an insurance business, and all executors, administrators, guardians, trustees, and other fiduciaries may legally invest any sinking funds, moneys, or other funds belonging to them or within their control in bonds or revenue certificates of the Florida state improvement commission or the Florida development commission issued under the authority of former chapter 420, prior to its repeal, or under the authority of chapter 288, provided that such bonds or certificates have been approved by the state board of administration as to their legal and fiscal sufficiency and have been validated by a court of competent jurisdiction, and such bonds or certificates shall be authorized security for all public deposits, including, but not restricted to, deposits as authorized in §18.10, chapter 136, and chapter 237, it being the purpose of this section to authorize any person, firm or corporation, association, political subdivision, body and officer, public or private, to use any funds owned or controlled by them, including, but not limited to, sinking, insurance, investment, retirement, compensation, pension and trust funds, and funds held on deposit, for the purchase of any such bonds, or certificates, up to the amount as authorized by law to be invested in any type of security, including United States government bonds." (Emphasis supplied.)

It might appear, insofar as bonds of the Florida development commission are concerned, that there is a conflict between §288.153, supra, and §§18.11 and 136.02, F. S., with respect to the requirement for the rating of such bonds. However, a careful examination of §288.153, indicates that it is the legislative intent that the Florida development commission (Florida state improvement commission) bonds are to be considered as legal investments and security for all public deposits notwithstanding that such bonds or certificates have not been

rated as required in §§18.11 and 136.02, F. S. This legislative intent is evidenced by the specific wording of §288.153 with respect to the restrictions on investments contained elsewhere, as follows:

... notwithstanding any other restrictions on investments contained in any law of this state, ... fiduciaries may legally invest ... in bonds or revenue certificates of the ... commission ... and such bonds or certificates shall be authorized security for all public deposits, including, but not restricted to, deposits as authorized in §18.10, and chapters 136, and 237 ...

While this question can be resolved by ascertaining the legislative intent as evidenced by the language in §288.153, the same conclusion may be reached by referring to other established principles of statutory construction. Section 288.153, F. S., was enacted *subsequent* to the applicable portions of §§18.11 and 136.02, F. S. (Ch. 59-389, and Ch. 59-26 and 59-23, Laws of 1959, respectively). Statutes relating to the same subject (passed at the same Session) will be considered in *pari materia* and will be construed so that each will be effective, if that is possible; but if they are repugnant, then the last one enacted will control. (*Providence Life and Accident Insurance Co. of Chattanooga, Tenn., v. Mathers*, 26 So. 3d 814).

The provisions of Chs. 18 and 136 will be applicable to all bonds and certificates issued by state agencies, including those of the Florida development commission (Florida state improvement commission), except insofar as any conflict exists. Consequently, Florida development commission bonds or certificates, which have been approved and validated as required by §288.153, *supra*, are *not* required to be rated in one of the highest four classifications by established, nationally recognized, investment rating services in order for them to be acceptable as legal investment and security for all public deposits. Your question is, therefore, answered in the negative.

063-105—August 16, 1963

PUBLIC DEFENDERS

MULTIPLE DEFENDANTS—CONFLICT OF INTEREST

To: *W. D. Frederick, Jr., Public Defender, Orlando*

QUESTIONS:

1. As a matter of ethics, would it be proper for you to continue to represent all four of said defendants?
2. If the answer to question 1 is in the negative, would the situation be rectified by having each of the 4 defendants represented by a different assistant public defender in your office?

If, as now apparently seems probable, the 2 defendants who have pleaded guilty will testify against the 2 who have pleaded not guilty, it seems to me that their interests may well come into conflict with the interests of the 2 who have pleaded not guilty. It seems reasonable to suppose that a defendant who turns state's evidence against his codefendant is interested in giving testimony which will aid in convicting his codefendant, perhaps in the hope of obtaining leniency for himself, and that his interest is in direct conflict with the interest of the codefendant against whom he testifies.

Moreover, you might find it appropriate to give advice to the 2 who have pleaded guilty which, if followed, would promote, their own

interests and at the same time help to convict the 2 who have pleaded not guilty.

Under the circumstances, I do not think that it would be proper for you to continue to represent all 4 defendants. I do not think that the situation would be rectified by having a different assistant public defender represent each of the 4 defendants. Your assistants have no independent status; they derive their authority from you and act in your stead as your agents. Their acts in defending an indigent defendant are in legal effect your acts.

I think that under the facts stated in your letter, it would be advisable for you to apply to the trial court to be relieved from representing either the 2 defendants who have pleaded guilty or the 2 who have pleaded not guilty, so that other counsel may be appointed to defend the 2 who would thereby be left without counsel.

063-106—August 19, 1963

CLERK OF CIRCUIT COURT

FEES—RECORDING SATISFACTIONS OF MORTGAGES, MARGINAL SATISFACTIONS AND INDEXING—§§701.03, 28.22, 28.221, 28.24, F. S.

To: *Clyde J. Keys, Clerk of Circuit Court, Clearwater*

QUESTIONS:

1. What is the fee of the clerk of the circuit court for:
 - (a) Recording a single instrument of a satisfaction of multiple mortgages wherein there appears a single mortgagee and several mortgagors;
 - (b) Entering a note of satisfaction on the margins of the records of such multiple mortgages, and
 - (c) Each entry in indexing such satisfactions of mortgage?

AS TO QUESTION 1 (a):

Pursuant to §701.03, F. S., it is incumbent upon a mortgagee to cancel a fully satisfied mortgage in the manner provided by §28.22, F. S. The clerk is required to record a satisfaction of mortgage in the mortgage lien and satisfaction book (§28.22(5), F. S.), or in the alternative such instrument may be recorded in the official records (§28.221, F. S.).

As amended, §28.24, F. S., provides for a fee of \$2 for recording by photographic process an instrument consisting of not more than 1 page or fraction thereof. An additional charge of \$1 is required for each additional page.

It appears that the legislature contemplated the recording of a single instrument in satisfaction of multiple mortgages because §28.24, F. S., allows the clerk a fee of 50¢ for each note of satisfaction, in excess of 1, made on the margin of each original mortgage of record. Hence, it is my opinion that a single instrument issued by a mortgagee in satisfaction of multiple mortgages should be recorded for a fee of \$2 as provided by §28.24, F. S.

AS TO QUESTION 1 (b):

Where several mortgages are cancelled of record by the recording of a single instrument, and notation of such satisfaction of those recorded mortgages is made on the margin of each original mortgage recorded, the fee of the clerk of the circuit court would be 50¢ for each such notation in excess of 1. (§28.24, F. S.).

AS TO QUESTION 1 (c):

Amendments to §696.05(2), F. S., have removed the language quoted in AGO 053-238; viz. "... shall include the cost of the indexing of the record." Without this language in said section, it now appears that the fee for recording does not include the cost of indexing the record; hence a fee for indexing is proper, and AGO 053-238 is superseded by this opinion insofar as this question is involved. It further appears that under §28.24, F. S., a clerk may charge 15¢ for each entry in the indexing of satisfaction of mortgages wherein there appears a single mortgagee and multiple mortgagors.

063-107—August 29, 1963

TAXATION

DOCUMENTARY STAMP TAXES—CORPORATE TRANSACTIONS—§201.02, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are deeds from privately owned corporations to officers or stockholders of such corporation subject to documentary stamp taxes, when:

1. Stock is surrendered therefor and the corporation continues;
2. No stock is surrendered therefor and the corporation continues;
3. Stock is surrendered and the real estate is encumbered by lien or mortgage and the corporation continues; or
4. No stock is surrendered and the real estate is encumbered by lien or mortgage and the corporation continues?

Under §201.02, F. S., a documentary stamp tax is imposed "on deeds, instruments or writings, whereby any lands, tenements or other realty, or any interest therein, shall be granted, assigned, transferred or otherwise conveyed to or vested in the purchaser, or any other person by his direction," said tax being measured by each hundred dollars of the consideration therefor. The consideration for the conveyance measures the amount of the documentary stamp taxes due and payable for the real property conveyed. For a conveyance of real property to be taxable under §201.02, F. S., the consideration therefor must have a monetary value (*Culbreath v. Reid, Fla., 65 So. 2d 556*). In *Culbreath v. Reid*, supra, it was held that a conveyance of real property by parents to their daughter, in consideration of "love and affection," was one without monetary consideration and not subject to taxation under said §201.02, F. S.

Under federal tax regulation No. 43-4361, the following transactions are deemed subject to federal documentary stamp taxes: (1) the conveyance of realty in exchange for other property having a monetary value; (2) the conveyance of realty in consideration of life maintenance; (3) the conveyance of realty to a corporation in exchange for shares of its stock; (4) the conveyance of realty by a corporation in liquidation or in dissolution to its shareholders subject to the debts of the corporation; "however, if there are no corporate debts and the conveyance is made solely for the cancellation and retirement of the capital stock, the tax does not apply."

The answer to the above-stated question, and the several sub-questions, depends on whether or not the grantor or grantors received anything of value for having made the conveyance. If there was anything of value passing from the stockholder or officer to whom the conveyance was made, then there was a consideration for such conveyance taxable on the basis of its monetary value. Where a conveyance is made to a stockholder in consideration of his surrendering stock held by him, with the corporation continuing, it would be presumed that there was a consideration equal to the value of the stock surrendered. In like cases where no stock is surrendered by the stockholder there would appear to be no tax when such conveyance is in consideration of liquidation or partial liquidation; there would appear to be a reduction of the value of the property of the corporation and an increase in the value of the property of the stockholder, equal to the value of the property conveyed when there is no liquidation. This would appear to be a taxable transaction based on the value of the property so conveyed.

Where corporate stock is surrendered by a stockholder to whom a conveyance of corporate realty is made, there would appear to be a detriment to the corporation and a benefit to the stockholder in the amount of the value of the property conveyed. Under usual circumstances the making of a mortgage or lien by the grantee after he has received the grant from the corporation would in no way affect the consideration therefor, the same being the value of the property conveyed; however, circumstances might have some bearing upon the question of taxes. Where there was a like transfer of property without the surrender of corporate stock to the stockholder, there would be a presumption that there would nevertheless be a detriment to the corporation and a benefit to the stockholder in the amount of the value of the property conveyed; however, as in the last above-mentioned case, circumstances might have some bearing upon the question of taxes. Only in those cases where the conveyance was made without consideration and as a gift would it be free from documentary stamp taxes.

Conveyances to officers of the company, without regard to whether stockholders or not, would appear to be a detriment to the corporation and a benefit to the officer, thereby creating a taxable transaction, the consideration being presumed to be the value of the property conveyed to such officer or officers. Should the conveyance be to officers in some capacity other than as an individual, the circumstances attending such transaction must be considered and, from all the facts and circumstances, it must be determined whether or not there was a detriment to the corporation and a benefit to the officer, or persons represented by him, if held by him for others.

The answer to the question and the subsections depends largely on the facts and circumstances involved in each particular case. The primary question is whether there has been a detriment to the seller and a monetary benefit to the purchaser, or vice versa, and, if so, there is a taxable transaction.

063-108—August 30, 1963

CLERK OF CIRCUIT COURT

RECORDATION OF SIGNED CARBON COPY OF INSTRUMENT

To: G. W. Robarts, Clerk of Circuit Court, Lake City

QUESTION:

May the clerk of the circuit court record an originally signed carbon copy of an instrument otherwise entitled to record?

A carbon copy of an instrument otherwise entitled to record and bearing original signatures may be recorded as a duplicate original, 65 A. L. R. 2nd. Text 351, where it can be determined from the instrument presented for recordation that the parties intended it as a duplicate original, *Lockwood v. L. & L. Freight Line*, 179 So. 236. For example, should the clerk be presented an instrument recognizable as a carbon copy which bears on its face a notation that it is a duplicate original and otherwise satisfies the statutory requirements as to acknowledgment, etc., such instrument may be spread upon public records.

It should be noted that where materials used in the preparation of the duplicate original make it incapable of being recorded by a photographic or microfilm recordation process used by the clerk, the clerk would be authorized to record the instrument by other than photographic process.

063-109—August 30, 1963

SURETY BONDS

REQUIREMENTS AND APPROVAL IN ATTACHMENT, REPLEVIN, DISTRESS FOR RENT, GARNISHMENT, AND

APPEALS—§§627.0900(1), 627.0901, 76.12, 78.07, 83.12, 77.18, 924.15, F. S.

To: *D. T. Farabee, Clerk, Circuit Court, Fort Myers*

QUESTIONS:

1. May the clerk of the circuit court approve the bond of a surety company authorized to do business in Florida as sole surety on bonds filed as a predicate for the issuance of writs of replevin, distress warrants and appeals?

2. Do §§903.09 and 903.50, F. S., which deal with the justification of sureties and registration of bailbondsmen, respectively, apply to surety companies authorized to do business in Florida posting bonds in actions in attachment, garnishment, replevin and distress for rent?

3. Must bonds required to be filed in actions in attachment, distress for rent and garnishment be filed and approved prior to the issuance of a writ in any of these actions?

4. What criteria should the clerk use in approving a replevin bond?

AS TO QUESTION 1:

Section 627.0900 (1), F. S., provides:

Subject to other applicable provisions of part XI of Chapter 627, any surety insurer having a currently effective certificate of authority to transact such insurance in this state may be accepted as surety on the bond of any person required by the laws of this state to give bond, and may be the only surety necessary to render the bond valid, but other surety may, in the discretion of the official authorized to approve the bond, be required. (Emphasis supplied.)

Section 627.0901 (1), F. S., provides:

In all judicial proceedings, whenever it may become

necessary for any party thereto to give a bond for any purpose, the bond of such party having as surety thereon any surety insurer authorized to do business in this state, may be accepted, by any officer or court whose duty is to approve such bond, without other surety. This section shall apply also to bonds given in connection with any appellate proceeding for the purpose of obtaining supersedeas, or for any other purpose. (Emphasis supplied.)

The foregoing sections are the most recent legislative expressions involving such bonds and provide an alternative method to provide surety on a bond to those provided by §§78.07 and 83.12, F. S., and other similar statutes of this state. The same rationale applies in regard to appeal bonds when such bonds are entered pursuant to §924.15, F. S. Hence, your first question is answered in the affirmative. AS TO QUESTION 2:

The provisions cited in question 2 appear in the criminal sections of the Florida Statutes and apply only to bailbonds and bailbondsmen. These specific sections would not apply to civil actions such as attachment, garnishment, replevin and distress for rent. Hence, question 2 is answered in the negative.

AS TO QUESTION 3:

Section 76.12, F. S., provides in part:

No Attachment shall issue *until the person applying for same, his agent or attorney, shall enter into bond . . .* (Emphasis supplied.)

Section 83.12, F. S., provides in part:

Upon the filing of such affidavit the clerk, or the judge if the court have no clerk, shall issue a Distress Warrant . . . provided, that upon the filing of the affidavit provided for in Section 83.11 and *before warrant shall issue*, the plaintiff, his agent or attorney, shall also file a bond. . . . (Emphasis supplied.)

Section 77.18, F. S., provides in part:

Except in cases in which the plaintiff has had an Attachment, no Writ of Garnishment before judgment shall issue until the person applying for same, his agent or attorney, shall enter into bond. . .

Under the foregoing it appears that the clerk should approve bonds prior to the issuance of a writ of attachment, distress warrant or writ of garnishment. It is noted that §77.18, F. S., does not require the filing of a bond where a writ of attachment has already been issued or where a judgment has been rendered. *Corbin v. St. Lucie River Co.* 78 So. 2d 396, 47 A.L.R. 2nd, 968.

AS TO QUESTION 4:

Where individual sureties are involved the clerk should be satisfied that their aggregate net is worth over and above their liability as surety on the bond viz. the amount of the bond as required by the controlling statutory provisions.

In determining the net worth of individual sureties, the clerk should take cognizance of the debts and liabilities of the individual in relationship to the properties or moneys pledged as surety for the obligation. It should be noted that the constitution and statutes of this state provide exemption from forced sale, viz. execution, as to certain real and personal property. For surety purposes the net worth of the individual must provide funds or property of a type and value which can be made available through judicial process to satisfy the surety's obligation resulting from the principal's default

in the undertaking, should said default occur.

Where a surety company is involved the clerk should be satisfied,

(a) that the surety company is authorized to do business in Florida,

(b) that the bond is of sufficient amount,

(c) that the agent of the company is authorized by current power of attorney to issue the particular type and amount of bond on behalf of the company,

(d) that the bond contains a proper undertaking,

(e) that the bond is signed by both the principal, and the agent of the surety company, and

(f) that the bond is signed by a Florida resident agent of the company.

063-110—September 16, 1963

RETIREMENT

DESIGNATION OF BENEFICIARY—CHANGE BY WILL— §122.12, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May a member of the state and county officers and employees retirement system of Florida, who has filed with the comptroller a designation of beneficiary, as authorized under and by §122.12, F. S., change such designation of beneficiary by an item in his last will and testament?

It appears from your file handed us with your request for an opinion that state employee No. 72,919 became an employee of the state on October 17, 1956, and a member of the state and county officers and employees retirement system on the same day. Such employee on said Oct. 17, 1956 made and filed with the comptroller, as authorized by §122.12(1), F. S., a designation of beneficiary naming the said employee's spouse as beneficiary and a daughter as second choice of a beneficiary. Subsequently, (on June 3, 1960) the said employee, by her last will and testament did "give, devise and bequeath all property of whatsoever kind and wheresoever situated, of which I may die seized and possessed, to my daughter _____." The daughter named in said devise is the same daughter named as second beneficiary as above-mentioned.

Subsequent to the events aforesaid, the said employee and her spouse became involved in extensive divorce and other marital litigation, such litigation resulting in decree of separation and a decree for alimony from the husband to the wife, the wife being the state employee herein mentioned. The said state employee and member of the state and county officers and employees retirement system died testate as aforesaid on Feb. 2, 1962. The said husband appears to have survived his wife and state employee.

We note that the said employee's last will and testament devised to her devisee "all property of whatsoever kind and wheresoever situate, of which I may die seized and possessed," making no specific mention in said last will and testament of the funds held to her account in the state and county officers and employees retirement system. Was this provision in the said state employee's last will and testament sufficient as a change of beneficiary under said §122.12, F. S.? This section, insofar as here material, provides that "any officer or employee may file, in writing, a designation of beneficiary

and it shall be the duty of the comptroller to refund 100%, without interest, of the contributions made to the retirement trust fund by such deceased officer or employee to such designated beneficiary. The officer or employee shall have the *privilege of changing, in writing, the designated beneficiary at any time.*" (Emphasis supplied.) The comptroller of the state is the administrator of the retirement system.

From our examination of authorities bearing on the question of changing beneficiaries in insurance policies of different kinds, we gather the rule to be that such beneficiaries may be changed, when not prohibited by some statute or provision in the insurance policy, by a will where such will clearly shows an intention to change the beneficiary specified in such a policy to a different or another beneficiary, but not otherwise (see 2 Applemen, Insurance Law and Practice, 494, et seq., §§1072, et seq.; 46 C. J. S. 84, 944 and 954, etc., §§1176, 1560 and 1568; 94 C. J. S. 792-793, §86).

We are, therefore, of the opinion that the provisions in §122.12 (1), F. S., providing that "the officer or employee shall have the privilege of changing, in writing, the designated beneficiary at any time," contemplates the specific designation of a beneficiary in a change made pursuant to said subsection and that a provision in a will giving, devising and bequeathing all property of whatsoever kind and wheresoever situated, of the testator, without evidencing a clear intent to change the existing beneficiary previously named to an identified new beneficiary, does not meet the requirements of said §122.12(1), F. S. The will before us fails to meet these requirements.

The comptroller, not being a party to the proceeding in the estate of _____, lately pending in Dade county, wherein the comptroller was directed to pay "that certain funds . . . held by the Comptroller of the State of Florida in the State and County Officers and Employees Retirement Fund" over to the executrix of the said estate, *not being a party to said proceeding* would, we fear, not be protected by said order.

063-111—September 18, 1963

NOTARIES PUBLIC

APPOINTMENT OF MINORS WHOSE DISABILITIES OF
NONAGE HAVE BEEN REMOVED—§§117.01, 117.02,
741.06, 743.02, F. S.; CH. 63-138, LAWS OF FLORIDA;
§15, ART. XVI, STATE CONST.

To: Tom Adams, Secretary of State, Tallahassee

QUESTION:

Is an individual over the age of 18 but under 21 years of age who has had his or her disabilities of non-age removed by marriage or judicial decree eligible for appointment as a notary public?

Chapter 63-138 is a revision of Ch. 117, F. S., the notary public law of Florida. Section 1 of Ch. 63-138 amends §117.01 by adding in part the language underscored below:

The governor may appoint as many notaries public as to him shall seem necessary, *each of whom shall be at least twenty-one (21) years of age*, a citizen of the United States, and a permanent resident of the State of Florida for one year; . . . (Emphasis supplied.)

Section 117.02, F. S., prior to its amendment in 1963 provided:

Women *over twenty-one years of age* are eligible to appointment by the governor as notaries public, and to hold and exercise the office thereof upon the same terms and conditions, and with the same powers and emoluments, as notaries now appointed by the governor, §1, Ch. 4742, 1899 (Emphasis supplied.)

This office has repeatedly held that minor females over the age 18 who had had their disabilities removed by marriage or judicial decree were eligible for appointment as notaries public. See AGO 043-100, p. 173 of the 1943-44 Biennial Report of the Attorney General, and AGO 048-361, p. 134 of the 1947-48 Biennial Report of the Attorney General.

Section 117.01, F. S., as amended by Ch. 63-138, merely extends to all notaries the age requirement previously applicable to women only.

Accordingly this office would be inclined to adhere to the established precedent and conclude that the same rule previously applicable to minor females in the above cited opinions be extended to minor male applicants for notary commissions under the new restrictions now found in §117.01, F. S., as amended by Ch. 63-138.

In so holding the writer points to *State ex rel Lamson v. Baker*, 25 Fla. 598, 6 So. 445, cited in AGO 043-100, *supra*, wherein the Florida supreme court allowed a minor over the age of 18 whose disabilities of nonage had been removed by judicial decree to apply for examination for a license to practice law under a statute requiring applicants to be 21 years of age. See also *Watts v. State*, Fla. 160 Fla. 277, 34 So. 2d 429.

It should perhaps be noted in passing that §743.02, F. S., provides for the removal of disabilities of nonage for all married minor females and that §741.06, F. S., authorizes females who have attained age 16 to apply for marriage certificates. This office previously considered the question relating to the application of a married minor female *under* the age of 18 for a notary's commission in AGO 048-361, *supra*, and concluded that since no female who was not over the age of 18 could have her disabilities of nonage removed by judicial decree under the provisions of §62.23, F. S., this amounted to an expression of the legislature "that minors less than that age (18 years) have not reached such maturity as to warrant removal of said disabilities. Disabilities of nonage of female minors are as effectively removed by marriage as by judicial decree; however such apparent legislative expression as to eligibility with respect to age in the latter instance should control here." This ruling that a married minor female is not eligible for appointment until she is over the age of 18 is hereby re-affirmed.

The age requirements of notaries are not restricted by constitutional provision as are, for instance, the qualifications to vote (see §1, Art. VI, State Const., 17 Fla. Jur. 322, *Infants*, §§5, 6, 11 Fla. Jur. 353, *Elections*, §15, citing *Riley v. Holmer*, 100 Fla. 938, 131 So. 33) thus it is competent for the legislature to regulate the age of majority by permitting the removal of disabilities in the instant situations while it may not do so with regard to voting rights and other matters spelled out more particularly in the State Const.

Notaries are officers of the state (§15, Art. XVI, State Const.) and it is the popular concept that only registered voters (hence persons 21 years of age and upward) are eligible to public office in this state. Such is not necessarily true. The Florida supreme court

held in *State v. George*, 23 Fla. 585, 3 So. 81, and in *In Re Opinion of Judges*, 62 Fla. 1, 57 So. 351, that under the Const., 1885 it was not intended to make the qualifications of officers other than the governor and state representatives and senators dependent upon the qualifications for voters. Further it was held in *Harkreader v. State*, 35 Tex. Cr. 243, 33 S. W. 117, that since the office of a county clerk was a ministerial one and since the constitution and laws of that state were silent with respect to qualifications for a deputy county clerk, a minor could be appointed such a deputy. We find further that it was the common law rule that infants were eligible to public offices which were ministerial. 43 C. J. S. 85, Infants, §24.

Accordingly since a notary is a ministerial officer it should follow that the position could be held by a minor under this rule.

It should be mentioned that appointment under these or any other circumstances where the applicant meets the statutory requirements is not automatic as the governor may exercise the same discretion in appointing notaries he does in appointing any other officers and should he for some reason feel an applicant unfit for appointment he could, of course, reject the application.

In conclusion then it would appear from the authorities cited herein that a minor male or female over the age of 18 whose disabilities of nonage had been removed by marriage or judicial decree would be eligible for appointment as a notary public. Your question as set out above is answered in the affirmative.

063-112—September 19, 1963

APPEARANCE BONDS

REMISSION OF FORFEITURE—TIME LIMITATION— §§903.26-903.32, F. S.

To: *Richard M. Stanley, County Judge, Naples*

QUESTION:

Does a county judge have the authority to direct a remission of forfeiture of an appearance bond when said bond has been estreated for over 17 months?

The pertinent provisions dealing with forfeiture of bail bonds are §§903.26 through 903.32, F. S. Section 903.28, F. S., 1961, provides:

After the payment of the forfeiture the court before which the case is pending may, for reasonable cause shown, within six months of the date of forfeiture, direct a remission of forfeiture in whole or in part upon such terms as are just; and shall direct a remission of forfeiture if it shall appear there was no breach of the undertaking or the defendant was at the time of required appearance adjudicated insane and confined and is still confined in an institution or hospital; provided, however, if the bail bondsmen or his surety company shall apprehend the defendant whose failure to appear or to fulfill his bond contract which resulted in the forfeiture of the undertaking and cause him to be returned to the custody of the official in whose custody he was at the time bail was taken or official into whose custody he would have been given had he been committed, within six months from the date of forfeiture, said for-

feiture shall be refunded, except where the trial court shall find that the failure to sooner apprehend or return the defendant has defeated the ends of justice and thwarted the successful prosecution of the defendant. (Emphasis supplied.)

Under the foregoing it appears that the time limit wherein the remission of forfeitures may be made is six months after the payment of the forfeiture. Nothing in the above provision indicates that any exceptions may be made and, hence, your question is answered in the negative.

Section 903.271, F. S., is a new section which was added to Ch. 903, F. S., by Ch. 61-406, and provides:

903.271 No Remission of Judgment—Under this chapter no remission shall be made where a forfeiture has been reduced to judgment.

This section would appear to preclude any remissions of forfeiture under §903.28, F. S., when such forfeiture has been reduced to judgment.

This opinion is rendered on the assumption that the bond issued, in this instance, to secure the appearance of the principal was issued subsequent to July 1, 1961, when the statutory provisions cited herein became effective.

063-113—September 24, 1963

COUNTY OFFICERS AND EMPLOYEES

EMPLOYED PROSECUTING ATTORNEY NOT OFFICER—
LIMITATION ON COMPENSATION—§§125.03, 125.04, 116.03,
145.12, 145.14, F. S.; §7, ART. III, §15, ART. XVI,
STATE CONST.

To: Ernest Ellison, State Auditor, Tallahassee

QUESTIONS:

1. Is a prosecuting attorney employed by a board of county commissioners pursuant to §125.03, F. S., and compensated under the provisions of §125.04, F. S., required to file an annual report as provided in §§116.03 and 145.12, F. S., the same as a state and county officer?

2. Is the compensation of a prosecuting attorney employed by the board limited to \$7,500 annually as provided in AGO 062-61?

AS TO QUESTION 1:

In AGO 057-25, considering the question of whether a member of the house of representatives would be authorized to be employed by the board of county commissioners as county prosecuting attorney, it was noted among other things that:

The legislature cannot be assumed to have intended to create an office by Section 125.03, F. S. The necessary assumption is that if the legislature had intended to create an office it would have provided for the incumbent to have been elected by the people or appointed by the governor, as required by the constitution, rather than merely employed by the county commissioners. Hence, in my opinion, Section 7, Article III, and Section 15, Article XVI, cannot be construed as being applicable to the employment contemplated by Section 125.03, F. S.

Pursuant to the above rationale, I am of the opinion that a prosecuting attorney employed by a board of county commissioners, not being an incumbent of an office or an official by election by

the people or appointment of the governor, does not come within the purview of §§116.03 and 145.12, F. S. Such prosecuting attorneys as employees would not as a matter of law be required to file annual reports of all fees and commissions which he receives pursuant to said section. Question 1 is answered in the negative.

AS TO QUESTION 2:

Although AGO 062-61 fails to distinguish between the elected county prosecuting attorneys and county prosecutors employed by a board of county commissioners pursuant to general law, it is limited in its application to the elected official. Nor does it appear that §3, Ch. 63-560, applies to employed county prosecuting attorneys. Said §3 provides that:

145.14 Compensation of County Officials who are paid by fees or commissions —

Each county official whose compensation for his official duties is paid wholly or partly by fees or commissions, and whose compensation is not provided for herein shall receive as his yearly compensation for his official services from the whole or part of the fees, or commissions so collected, the following sum only: All the net income from his office not to exceed seven thousand five hundred dollars (\$7,500.00) unless otherwise provided by law.

Said §145.14, F. S., is inapplicable because there is a material distinction between one occupying an "official position" and one who performs duties purely by virtue of "employment," since an "official" is often elected by resident electors, for definite term, subscribes oath of office and is entrusted with performance of some of the sovereign functions of government, being subject to removal for failure to perform duty or for misconduct or malfeasance. The services of an official are continuing and permanent rather than temporary and transitory, as in the case of an "employee." *Loard v. Como*, Tex. Civ. App., 137 S.W. 2d 880-882. Question 2 is answered in the negative.

063-114—September 25, 1963

PER DIEM AND TRAVEL EXPENSES

LAW ENFORCEMENT OFFICERS SERVING AS WITNESSES—
CONSTRUCTION OF CH. 63-508, LAWS OF FLORIDA—
§§90.141, 112.061, 902.19(4), F. S.

To: *Jess Mathas, Clerk, Circuit Court, DeLand*

QUESTION:

Does Ch. 63-508, authorize the payment of per diem and travel expenses to law enforcement officers appearing as official witnesses to testify at hearings or law actions in courts located in the county in which such officer holds office, is employed, or has his residence?

Section 1 of Ch. 63-508, amends Ch. 90, F. S., by adding §90.141 thereto, which provides:

90.141 *Law enforcement officers; per diem, expenses.*—

Any law enforcement officer of any municipality, county or the state who shall appear as an official witness to testify at any hearing or law action in any court of this state as a direct result of his employment as a law enforcement officer shall be entitled to per diem and traveling expenses at the

same rate provided for state employees under section 112.061, Florida Statutes. (Emphasis supplied.)
Section 902.19(4) F. S., provides:

No sheriff, deputy sheriff, constable, deputy constable, highway patrolman, or other person employed or paid by the state or any county thereof as a law enforcement officer, shall be entitled to witness fees or to mileage when summoned to testify in any court sitting in the county in which he holds office, is employed, or has his residence.

Inasmuch as compensation for travel expenses is distinguishable from the payment of witness fees the sole conflict between §90.141, F. S., and §902.19(4) F. S., 1961, *supra*, relates to the payment of mileage to law enforcement officers who appear as official witnesses at hearings or law actions in the courts of this state.

As to conflicting provisions of general law pertaining to the payment of travel expenses to public officers, employees, and authorized persons, §112.061(1)(b)1., as amended resolves such conflicts. Said section provides as follows:

The provisions of this section *shall prevail* over any conflicting provisions in a general law, present or future, to the extent of the conflict; but if any such general law contains a specific exemption from this section, including a specific reference to this section, such general law shall prevail, but only to the extent of the exemption. (Emphasis supplied.)

Amended §112.061(2) (k), (l), (m), F. S., recognizes three kinds of travel which are, respectively:

(k) Class A travel—continuous travel of twenty-four hours or more away from official headquarters.

(l) Class B travel—continuous travel of less than twenty-four hours which involves overnight absence from official headquarters.

(m) Class C travel—travel for short or day trips where the traveler is not away from his official headquarters overnight.

Significantly, all three classes of travel require absence from official headquarters. Said §112.061(4) provides that "the official headquarters of an officer or employee assigned to an office shall be the city or town in which the office is located . . ."

Under certain circumstances the official headquarters of persons entitled to travel expenses may change (§112.061(4) (a) and (b).)

Where the law enforcement officer is elected by the people or is commissioned by the governor with jurisdiction extended throughout the state, such officer is entitled to receive reimbursement for travel expenses. Other law enforcement officers, whether commissioned or not, filling a regular or full time authorized position and responsible to an agency head, would also be entitled to reimbursement for travel expenses pursuant to §112.061(2) (c) and (d), F. S.

Upon consideration of the above statutory provisions, I am of the opinion that law enforcement officers appearing as official witnesses to testify at hearings or law actions in courts located in the county in which such officer holds office, is employed, or has his residence, would be entitled to reimbursement for per diem and mileage travel expenses pursuant to §112.061, F. S., where such officer appears at hearings or law actions in court outside the city or town of his official headquarters, or the immediate vicinity thereof.

063-115—September 25, 1963

CRIMINAL PROCEDURE

COSTS AND EXPENSES INCURRED IN RETRIAL OR CON-
SIDERATION OF PERSONS WITHIN THE PURVIEW
OF CRIMINAL PROCEDURE RULE NO. 1—
§§58.10, 965.01, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are costs and expenses incurred in the retrial or consideration of persons within the purview of Florida criminal procedure rule No. 1, obligations of the state of Florida or the applicable county?

There is attached to your request for opinion a letter from William Baer, chief accountant of metropolitan Dade county, a claim for reimbursement from state funds of funds paid out by the county in connection with the retrial, or the consideration of applications for retrial, of prisoners under and pursuant to Florida criminal procedure rule No. 1. Most, if not all, of these charges appear to be photo copy information furnished by the clerk of the criminal court of record in and for Dade county, to the public defender of that county and judicial circuit, evidently information from former trials of the accused persons held in the said criminal court of record. These charges appear to have involved 161 criminal cases and total \$939.30, which amount the county claims a refund of from the state treasury.

These proceedings appear to be in law a proceeding in the original criminal case in which the applicants were convicted, but because of recent decisions of the supreme court of the U. S. are entitled to a re-examination of the procedure under which convicted and, in many instances, a setting aside of the original judgment and a retrial of the case in which the former conviction was obtained. In most, if not all instances, the crime was committed and the former trial had prior to the time the accused became a prisoner of the state prison system. We have nothing before us that even indicates that accused was a prisoner of the state in Dade county, when the crime of which he is accused was committed.

Section 58.10, F. S., upon which the claims for a refund are based, provides that "all lawful costs hereafter (June 5, 1939) legally against and legally paid by any county in all lunacy proceedings and all criminal prosecutions against state convicts imprisoned at the state prison farm at Raiford, and in all habeas corpus cases brought to test the legality of the imprisonment of state prisoners imprisoned at the state prison farm at Raiford, shall be refunded to the county paying the sum from the general revenue fund in the state treasury . . ." Under the unquoted portion of this section, setting out the procedural requirements required before refunds may be made thereunder, we doubt that such requirements have been sufficiently met. However, we lay this question aside and proceed to whether or not the claims made are within the purview of said §58.10, F. S.

Insofar as applicable here, said section provides that "all lawful costs hereafter legally adjudged against and paid by any county in . . . criminal prosecutions against state convicts imprisoned at the state prison farm at Raiford, and in all habeas corpus cases brought to test the legality of the imprisonment of state prisoners

imprisoned at the state prison farm at Raiford shall be refunded . . ." In either case such a convict must be "imprisoned at the state prison farm at Raiford." Said \$58.10 was derived from Ch. 19272, 1939, which became effective June 5, 1939, at which time it appears that the prison farm at Raiford was the only state prison farm in Florida. Provision was made by Ch. 23932, 1947, for the establishment of a prison farm at Lowell, Marion county. Subsequently, state prisons appear to have been established at Avon Park, Belle Glade and Chattahoochee. Presently, under \$965.01, F. S., correctional institutions (prisons) are located at Avon Park (Highlands county), Belle Glade (Palm Beach county), Chattahoochee (Gadsden county), Lowell (Marion county) and Raiford (Union county) with training centers in other locations (Lee, Orange, Jackson and Alachua counties). Even should we construe the reference in \$58.10, F. S., as extending to counties wherein other state prisons are located, such extension would not include Dade county.

We are of the view that said \$58.10, F. S., was designed, and its purpose was, to relieve Union county, wherein the state prison was then located, from the expenses incurred in lunacy proceedings involving state prisoners held in said Union county, and prisoners held in said prison in Union county who committed crimes in said county and were tried for such crime in said county.

In conclusion, we hold that costs and expenses incurred in the retrial or consideration of persons within the purview of Florida criminal procedure rule No. 1, are not obligations of the state of Florida except in those cases where the original trial and the retrial, or consideration of persons within the purview of the said criminal procedure rule, were properly held, or if committed now, would be triable in a county wherein is located a state prison. The claims laid before you by the letter from William Baer above-mentioned do not appear to be within the rule above announced, nor do any of them, and, on the file now before us, should not be paid from state funds.

063-116—September 25, 1963

DOCUMENTARY STAMP TAX

APPLICATION OF LAW TO OPTIONS, SALE AND PURCHASE CONTRACTS AND BINDER AGREEMENTS §§201.02, 201.08, CH. 199, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. When are option agreements, purchase and sale agreements or contracts, binder contracts and sales contracts and agreements, relating to real property, subject to excise taxes under §§201.02 and 201.08, F. S.?

2. When do the agreements, contracts and documents mentioned in the first question above constitute intangible personal property subject to taxation under Ch. 199, F. S.?

An option agreement or contract is an agreement or contract by which the owner of property, real or personal, agrees with another person that the latter shall have the right to buy the property therein described at a stated price within a specified or reasonable time and on agreed terms and price. Such an agreement or contract consists of

two elements: *first*, an offer to sell which does not become a contract until accepted; and *second*, leaving the offer open for a specified time. Although such an option may fully set out the consideration to be paid, its manner and time of payment and other things, such consideration, including the time or times of its payment, as well as the option itself, does not become either a conveyance of an interest in the property described therein or an agreement to pay the consideration mentioned unless and until acceptance by the purchaser. An option is but an offer to enter into a contract or agreement or to make a conveyance or transfer of property, and does not become a contract or agreement, or the transfer of an interest in property, until accepted by the purchaser or optionee.

There being no written obligation to pay money, or conveyance or transfer of property, or interest therein, until acceptance of the terms of the option, there is no written obligation to pay money or transfer of interest in property by the mere entering into an option to sell or to purchase property; and when such option is accepted by the optionee, it is no longer an option but becomes an agreement or contract. So-called options to sell or transfer property, or for any other purpose, should be examined to determine whether they are in law mere options or whether they are in fact contracts. Options, as such, are not within the purview of either §201.02 or §201.08, F. S. However, where so-called options are present obligations to pay money or transfer present interests in real property, they should be taxed as existing contracts or agreements and not as options.

Sales contracts or contracts of sale or of purchase.—The documents handed us with the request for opinion, designated "Contract for Sale and Purchase," and the one designated "Contract A and as Sales Agreement" appear to be contracts for the sale and conveyance of real property and differ little in form and substance. Each of the documents handed us describes the property to be sold or purchased, the consideration to be paid for the property and terms of payment; each requires the furnishing of an abstract of title by the owner. Most such sales or purchase contracts contain a written obligation to pay money, that is, a sum certain within a stated time, whether a single payment or in installments. Such documents, when executed by both the seller and purchaser, usually are written obligations to pay money within the purview of §201.08, F. S., and a conveyance or transfer of an equitable title to the real property described, with the legal title remaining in the vendor until the terms of the contract or agreement have been complied with.

When imposing documentary stamp taxes on sales and conveyances of real property AGO 059-244 of Nov. 25, 1959, as revised Feb. 25, 1960 (1959-1960 AGO 381) should be complied with. If such sales contracts, or contracts of sale or of purchase, contain a binding written obligation to pay money, and most of them do contain such a written obligation to pay money, they will be subject to taxation under §201.08, F. S. The issue in each case is whether or not there is a written obligation to pay money. If the vendor, on default of the vendee, has the right to proceed at common law or in equity against the vendee to collect the purchase money, then there is a written obligation to pay money within the purview of §201.08, F. S. Where contract or agreement forms are used by the parties any additions to the said forms, other than mere filling in of blanks, should receive careful consideration and determination of the effect of such addition, if any.

The document entitled "Option Agreement," handed us with the request for opinion, does not appear to be a conveyance of real estate or an interest therein, within the purview of §201.02, F. S., or written

obligation to pay money within the purview of §201.08, F. S., until converted into a contract by acceptance by the optionee. The other instruments handed us with the said request for opinion appear to be agreements for the payment of money in their present form, and subject to taxation under §201.08, F. S. These observations answer the first question.

Although the so-called "Option Agreement" appears to be a mere option until Jan. 2, 1964, unless accepted by the optionee prior to said date, although signed by the optionee, its acceptance by the optionee at any time prior to said date will convert the said option into an agreement or contract for the sale and conveyance of the property therein described from the time of such acceptance, unless a new agreement be entered into within a reasonable time after such acceptance. When so accepted the said (option) contract, or the agreement made pursuant thereto, would constitute written obligations to pay money from the vendee to the vendor, as do the other three agreements or contracts in their present form. Such written obligations to pay money are intangibles within the purview of Ch. 199, F. S., unless expired by their own terms or cancelled by mutual agreement of the parties.

063-117—October 3, 1963

PER DIEM AND TRAVEL EXPENSES

APPLICATION OF §112.061 TO COUNTY OFFICERS AND EMPLOYEES

To: William B. Leath, Attorney, Board of County Commissioners,
Panama City

QUESTION:

May a county commission, under §112.061, F. S., authorize the reimbursement of travel expenses to county officers and employees, pursuant to rules and regulations adopted by said county commission, for travel within the county but outside the county seat, when such travel is connected with the work of such officers and employees?

Section 112.061(2)(a) in defining agency for the purposes of the applicability of said §112.061, the per diem and travel expenses of public officers, employees and authorized persons law, expressly includes counties. Hence, said section, effective July 1, 1963, provides the formula for the payment of travel expenses to county officers, employees and authorized persons.

Said §112.061 in the absence of specific exemption in conflicting laws, controls as to conflicts between its provisions and other general laws including general laws of limited application. §112.061(1)-(b)1, F. S., 1963. However, the provisions of special or local laws prevail over conflicting provisions of said §112.061 to the extent of the conflict. Section 112.061(1)(b)2.

Absent circumstances under which sub§§ 1 and 2, supra, would be applicable to laws pertaining to reimbursement of travel expenses to county officers and employees and other authorized persons, such reimbursement is to be made pursuant to said §112.061, F. S.

Section 112.061(10)(b) F. S., expressly authorizes each agency to promulgate additional rules and regulations not conflicting with rules and regulations of the state comptroller as may be necessary to effectuate the purposes of the section. (Rules and regulations of the state comptroller pertaining to the payment of per diem and travel expenses may be obtained from the comptroller's office, capitol building, Tallahassee, Florida.) In the promulgation of rules and regulations

establishing the policy of the board of county commissioners as to payment of per diem and travel expenses pursuant to said section, your attention is invited to §112.061(7)(f), which authorizes the agency head, viz., board of county commissioners, to grant monthly allowances in fixed amount for use of privately owned automobiles on official business in lieu of the mileage rate provided by said §112.061.

Such allowances shall be reasonable, taking into account customary use of the automobile, the roads customarily traveled, and whether any of the expenses incident to the operation, maintenance and ownership of the automobile are paid from funds of the agency or other public funds. Such allowance may be changed at any time, and shall be made on the basis of a signed statement of the traveler, filed before the allowance is granted or changed, and at least annually thereafter. The statement shall show the places and distances for an average typical month's travel on official business, and the amount that would be allowed under the approved rate per mile for the travel shown in the statement, if payment had been made pursuant to paragraph (d) of this subsection.

Section 112.061(4) defines official headquarters of an officer or employee as a city or town in which the office is located. To that definition there are certain exceptions not material to your inquiry.

In view of the above provisions of §112.061, F. S., I am of the opinion that the board of county commissioners would be authorized to promulgate rules and regulations pertaining to reimbursement of per diem and travel expenses to county officers and employees to travel within the county but outside the county seat when such travel is officially authorized so long as such reimbursement is within the limits as to amount as prescribed by §112.061, F. S.

063-118—October 4, 1963

COUNTY DEPOSITORIES

QUALIFICATION-DISQUALIFICATION, §136.02, F. S.

CH. 63-112, LAWS OF FLORIDA

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

QUESTION:

If an officer or stockholder of a bank serves as a voluntary, unpaid member of an educational committee appointed by the county board of public instruction, is such bank disqualified under Florida law from acting as a depository of funds coming under the jurisdiction of said county board?

Section 136.02, F. S., as amended by Ch. 63-112, provides, in part:

136.02 Method of qualifying as depository; securities to be deposited; pro rata division of deposits.—

(5) The fact that a county or municipal officer or member of a public board or body, including a county school officer and an officer of any district within a county is a stockholder or an officer or director of a bank will not bar such banks from qualifying as a depository of funds coming under the jurisdiction of any such county or municipal officer, provided it shall appear in the records of the state or county agency that the governing body of such agency has investigated and determined that such county officer or member of a public board or body as aforesaid has not favored such bank or banks over other qualified banks and that there is no violation of Section (1) of Section 136.02.

The 1963 act, being the latest enactment of the legislature on the subject, clearly modifies the restrictions imposed by §839.09, F. S., and §230.23(10)(i), F. S., to the extent provided in the 1963 Statute (Ch. 63-112).

Your question relates to bank officers or stockholders who are "unpaid members of an educational committee appointed by the county board of public instruction." It does not relate to school officials, including board members and county school superintendents. Even in the absence of the 1963 amendment to §136.02, F. S., it appears clear that your question should be answered in the negative.

Under the provisions of the 1963 amendment, *supra*, county school board members may be stockholders or officers of banks without impairing the right of the bank to serve as a depository of school funds if the bank is otherwise qualified as provided by §136.02, F. S., as amended by Ch. 63-112.

All prior attorney general's opinions, including 062-81 and 061-132, are modified to the extent that they may now be in conflict with the 1963 amendment to §136.02, F. S.

063-119—October 11, 1963

**TRAVEL EXPENSE—STATE OFFICERS AND EMPLOYEES
ELECTION OFFICIALS, JURORS AND WITNESSES—CH.
63-400, LAWS OF FLORIDA; §§112.061(2) (k), (l), (m),
102.021, F. S.**

To: John F. Nicholson, Clerk, Circuit Court, Ocala

QUESTIONS:

What effect does Ch. 63-400, have on:

1. The compensation of clerks and deputy sheriffs serving at precinct polling places?
2. The compensation of jurors and witnesses?

AS TO QUESTION 1:

Section 5 of Ch. 63-400, 1963, amends §102.021, F. S., to read:

102.021 Compensation of inspectors and Clerks.—Inspectors and clerks of any election and the deputy sheriff serving at the precincts shall be paid for their services by their respective boards of county commissioners, and the inspectors who deliver the returns to the county seat shall receive such sum as the board of county commissioners shall determine but in no event shall the sum exceed one dollar per hour and traveling expenses as provided in Section 112.061, *Florida Statutes*. (Emphasis supplied.)

Under §102.021, F. S., prior to the above amendment, the inspectors who deliver the returns to the county seat were allowed 7½¢ per mile each way while performing such services. The above provision would now allow such inspectors 10¢ per mile for each mile traveled while performing the services of delivering the returns to the county seat.

In addition, the reference to travel expenses as provided in §112.061, F. S., authorizes the payment of per diem travel expenses to inspectors and clerks of elections and deputy sheriffs serving at the precinct where such persons, under proper authorization, incur expense in connection either with Class A, Class B, or Class C travel as designated by §112.061(2) (k), (l) and (m), F. S. Such designations are as follows:

- (k) Class A travel—continuous travel of 24 hours or more away from official headquarters.
- (l) Class B travel—continuous travel of less than 24

hours which involves overnight absence from official headquarters.

(m) Class C travel—travel for short or day trips where the traveler is not away from his official headquarters overnight.

Significantly, §112.061(4) defines the official headquarters of an official or employee assigned to an office as "the city or town in which the office is located . . ."

Perhaps the most applicable per diem allowance, because of the circumstances surrounding the usual activities of the clerks and inspectors of elections and the deputy sheriffs serving at the precincts, is that provided for in Class C travel, viz., breakfast—\$1.25, lunch—\$1.75, and dinner \$3. Question 1 is answered accordingly.

AS TO QUESTION 2:

The title of Ch. 63-400, provides that the act relates to traveling expenses of public officers, employees, and authorized persons, as defined therein. As these terms are defined in §1, Ch. 63-400 it would appear that jurors and witnesses are not public officers, employees, or authorized persons and that the legislature did not intend to include them under the act.

Chapters 40 and 90, F. S., respectively, include the provision dealing with the compensation of jurors and witnesses. Nowhere does Ch. 63-400 specifically allude to either Chs. 40 or 90, F. S., except in §19 wherein §40.12, F. S., which deals with the compensation of jury commissioners, is specifically brought within the act. The specific inclusion of §40.13, F. S., without the inclusion of the provisions of Ch. 40, F. S., providing for the compensation of jurors indicate a legislative intent not to include jurors in this act.

Hence, it is my opinion that Ch. 63-400, does not apply to jurors and witnesses.

063-120—October 14, 1963

SCHOOL CODE

INSTRUCTIONAL PERSONNEL—CONTINUING CONTRACTS, QUALIFICATION FOR—§231.36, F. S.

To: *Thomas D. Bailey, Superintendent of Public Instruction, Tallahassee*

QUESTION:

Would a teacher with the following record of service be entitled to a continuing contract:

Was appointed in August of 1959 to teach for the 1959-60 school term and rendered a full year of service; was reappointed in the spring of 1960 for the school year 1960-61 and rendered a full year of service; was reappointed in the spring of 1961 for the school term 1961-62 but prior to beginning of school term was granted a leave of absence; was returned to duty in February, 1962, but failed to render the number of days of service required to claim a year of service; was reappointed in the spring of 1962 for school year 1962-63 and rendered a full year of service; was reappointed to teach for school year 1963-64; holds a valid regular certificate and has filed the required examination score?

Section 231.36, F. S., as amended by the 1963 legislature, provides, in part, ". . . who has completed three (3) years of probationary service in the same county of the state during a period not in excess of five successive years. . . ."

Under the facts given in your question as applied to the statute

which became effective July 1, 1963, your question is answered in the affirmative.

063-121—October 15, 1963

COUNTY JUDGE

PAYMENT OF SALARY; BUDGETED IN COUNTY GENERAL FUND—CH. 63-365, LAWS OF FLORIDA

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Pursuant to the provisions of Ch. 63-365, is the county judge's salary to be budgeted in the general fund of the county?

Section 2 (2) of Ch. 63-365—The county judges budget account, among other things provides that "the Board of County Commissioners shall pay to the county judge *from the general fund of the county*, an amount sufficient to provide the county judge the compensation contemplated by this Section for such period." (Emphasis supplied.)

Section 3 (7) of said chapter provides that the budget of the county judge shall be included by the board of county commissioners or a budget commission, as the case may be, in the budget of either the general fund or the fine and forfeiture fund, or in part of each.

In view of the unequivocal legislative pronouncement of §2 (2), Ch. 63-365, supra, it is my opinion that the county judge's salary, where pursuant to the provisions of Ch. 63-365 said judge operates his office on a budget system, is to be paid from the general fund of the county.

063-122—October 16, 1963

UNEMPLOYMENT COMPENSATION

CONSTRUCTION OF §§222.15 AND 222.16, F. S., AS AMENDED —DISPOSITION OF COMPENSATION AFTER DEATH OF EMPLOYEE

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What disposition should be made of unemployment compensation accruing to an employee prior to and at the time of his death, leaving him surviving persons within the purview of §§222.15 and 222.16, F. S.?

From your file handed us with your request of Oct. 4, 1963, for an opinion construing §§222.15 and 222.16, F. S., as to unemployment compensation due and payable to an employee at the time of his death, which payment was prevented by reason of the said death, this unemployment compensation accrued and was payable prior to the effective date of Ch. 63-165, the employee in question having died March 29, 1962.

Section 222.15(2), F. S., provides:

... it shall be lawful for the industrial commission, in case of death of any unemployed individual to pay to those persons referred to in subsection one (surviving spouse, children over the age of eighteen years, or surviving parent or parents) any unemployment compensation payments that may be due said individual at the time of his death,"

where the amount due and unpaid *does not exceed the sum of \$300.*

Under this provision, where there are survivors as aforesaid, no administration of the estate is necessary when the compensation is not in excess of \$300, but would in most cases be necessary when the sum due exceeded \$300.

A reading of said §§222.15 and 222.16, F. S., prior to and after said amendment by Ch. 63-165, clearly shows that the amendments are applicable in all cases where the compensation due does not exceed \$300, whether the same accrued prior to or after the effective date of the said Ch. 63-165. Upon proof of the death of the employee, a showing of survivors within the purview of said §§222.15 and 222.16, F. S., where the sum due is \$300 or less, and the surrender of any outstanding warrant in payment of the said compensation due, you should, barring unusual circumstances, cancel the outstanding warrant and draw another in lieu thereof in payment of the compensation due the deceased at the time of his death.

063-123—October 18, 1963

TAXATION

TAXABILITY OF ADMISSIONS TO AGRICULTURAL FAIRS— §§212.02(16), 212.04, 616.07, F. S., CHS. 63-526 AND 63-393, LAWS OF FLORIDA

To: Doyle Conner, Commissioner of Agriculture, Tallahassee

QUESTION:

In light of Ch. 63-526, amending §§212.02(16) and 212.04, F. S., are admissions to agricultural fairs exempt from taxation?

Chapter 63-526, Laws of Florida, amended §212.02(16) and §212.04, F. S., to read as follows:

§212.02(16) The term 'admissions' shall mean and include the net sum of money after deduction of any federal taxes for admitting a person or vehicle or persons, to any place of amusement, sport or recreation, or where there is any show, game or exhibition and where any charge is made by way of sale of tickets, gate charges, seat charges, box charges, season pass charges, greens fees, *all dues paid to private clubs providing recreational facilities, including but not limited to golf, tennis, swimming, yachting and boating facilities; but specifically excluding civic, fraternal and religious clubs and organizations, participation fees, entrance fees, or other fees.*

§212.04 *Admissions tax; rate, procedure, enforcement, etc.*—It is hereby declared to be the legislative intent that every person exercising a taxable privilege who sells or receives anything of value, by way of admissions and that every person who sells admissions to any place of amusement, sport or recreation, or for the privilege of entering or staying in any place of amusement, sport or recreation, including but not limited to theatres, outdoor theatres, shows, exhibitions, games, races, or any place where charge is made by way of sale of tickets, gate charges, seat charges, box charges, season pass charges, cover charges, greens fees, participation fees, entrance fees or other fees, or receipts of anything of value measured on an admission or en-

trance or length of stay, or seat box accommodations, in any place of business or where there is any exhibition, entertainment, *amusement, sport or recreation*, shall be subject to a tax for the exercise of such privilege. *There shall be exempt all admissions to athletic events held by elementary, junior high schools, deaf and blind school and state correctional institutions.* Provided, however, that no municipality of the state shall hereafter levy an excise tax on admissions. The taxes imposed by this section shall be collected in addition to the admission tax collected pursuant to §550.09, F. S., but the amount collected under §550.09 F. S., shall not be subject to taxation under this chapter. For the exercise of said privilege a tax is levied as follows:

(2) The sale price or actual value of admission shall for the purpose of this chapter, be that price remaining after deduction of federal taxes, if any, imposed upon said admission and the rate of tax on each admission shall be according to the brackets established by §212.12(10), F. S.

Provided that no tax shall be levied as to admissions to athletic events engaged in by high schools, junior colleges and institutions of higher education in the state until Dec. 26, 1963.

(The underlined portions of the act were those added by the 1963 legislature.)

At the outset, it is noted that admissions to agricultural fairs have, since the enactment of the Florida sales and use tax law in 1949, been administratively construed to be exempt. For this reason, if we determine them to be taxable, it must be on the basis of the 1963 amendment noted above. An examination of these amendments do not, in my judgment, evidence a legislative intent to change the exempt status of admissions to agricultural fairs. The language which would make the better case for taxing admissions to fairs, to-wit: (admissions mean and include . . . show, game or exhibition . . .) were not of the 1963 amendment to the law.

Chapter 63-393, appropriated a sum in the amount of \$300,000 as matching funds whereunder the state participated on a 50% basis in construction of buildings used for agricultural fairs.

Section 616.07, F. S., provides in part as follows:

. . . all money and property of such (agricultural fairs) association shall . . . be used exclusively for the legitimate purpose of the association and shall be, so long as so used, exempt from all forms of taxation.

These 2 statutes, when taken in connection with the 1963 amendments to the admission tax statute, would evidence a legislative intent not to change the exempt status of admissions to agricultural fairs. It does not appear that §§212.02(16) and 212.04, F. S., as amended by Ch. 63-526, are repugnant to the tax exemption provisions of said §616.07, F. S. Two statutes which may operate on the same subject matter without repugnancy should each be given the effect defined for them. *Stuart v. DeLand—Special Road and Bridge District in Volusia County*, 71 So. 42, 71 Fla. 58; see also *Ellis v. City of Winter Haven*, 60 So. 2d 620.

Hence, I am of the opinion that in the absence of express repeal of the exemption from all forms of taxation provision of §616.07, F. S., supra, that admissions to agricultural fairs are not subject to taxation under §212.02(16) and §212.04, F. S. supra. Your question is therefore answered in the affirmative.

063-124—October 21, 1963

LOTTERIES

RETAIL MERCHANDISING BUSINESS, CERTAIN ACTIVITIES PERMITTED—§849.092 (CH. 63-553), CHS. 204, 208, F. S.

To: *William E. Allison, Town Attorney, St. Petersburg*

QUESTION:

Do the promotional programs described in the following statement of fact comply with Ch. 63-553 (§849.092, F. S.)?

STATEMENT OF FACTS:

1. A promotional device has been organized which will involve the giving away of articles of merchandise to persons selected by lot upon the following conditions:

(a) That the gifts are conducted as advertising and promotional undertakings, in good faith, solely for the purpose of advertising the goods of a business licensed under Ch. 204 or Ch. 208 of F. S., the principal business being under §§204.02 or 208.01;

(b) That chances will be given to persons having credit cards with the listed businesses, all of which are qualified as described in item (a);

(c) That no consideration need be paid to obtain a credit card with said businesses and no purchase of merchandise is required to be made in order to obtain a credit card from said businesses;

(d) That upon a person being selected by chance, the person will be notified at the address recorded on the credit card;

(e) The prize will be delivered at the address on the credit card without charge to the recipient.

2. The second promotional device will be exactly the same as the first with the following exceptions:

(a) The giving away of chances would not be based on credit cards;

(b) Any person could receive one chance by merely asking for it;

(c) Additional chances would be given to those purchasing merchandise at the store, to-wit:

Anyone requesting a chance will be qualified to receive a prize, but those purchasing merchandise will receive additional chances.

AS TO PROMOTIONAL PROGRAM 1:

Chapter 63-553 says that persons licensed under either Chs. 204 or 208, F. S., may give away articles of merchandise to persons selected by lot if certain prescribed conditions are met.

One of these conditions is that in order to be eligible to receive the gift, no person shall be required to purchase any "goods, wares, merchandise or anything of value" from the licensee putting on the program. Your letter merely states that no purchase of merchandise is required, which does not definitely exclude the idea that the purchase of something else of value might be required. If the purchase of anything of value from the licensee is required, the program is not authorized by the statute.

Chapter 63-553 requires that in order to be eligible to receive the gift, no person shall be required to enter into or upon the premises of the licensee at the time of any drawing or selection. Although your letter implies that this condition will be met, it does not specifically say so. Of course, it must be met if the program is to be conducted in accordance with the statute.

Chapter 63-553 requires that the person selected to receive the gift shall be notified of his selection and that the gift shall be delivered to him at his "last known address" without any expense to him. Your letter says that the person selected will be notified at the address shown on his credit card and that the gift will be delivered at that address. If it should be known that the person selected to receive the gift has moved to an address other than the one shown on his credit card, the statute would not be complied with by sending notice to him at the address shown on his credit card and by ineffectually attempting to deliver the gift to him at that address.

In all other respects, promotional program 1, as described in the foregoing quotation from your letter, appears to comply with the requirements of Ch. 63-553.

The fact that, in order to be eligible to participate, a person must hold a credit card issued by the business conducting the promotional program does not affect the conclusion expressed in the last preceding paragraph, inasmuch as such person is not required to purchase anything of value in order to be eligible to receive a chance.

AS TO PROMOTIONAL PROGRAM 2:

Even if this program were put on in such a way as to otherwise meet the requirements mentioned in the above discussion of program 1, it would still not comply with the statutory requirement that in order to be eligible to receive a gift, no person shall be required to purchase any goods, wares, merchandise or anything of value from the licensee putting on the program.

It might be plausibly argued that, inasmuch as any person may obtain one free chance upon request, he thereby becomes eligible to receive the gift and that it is therefore immaterial that he purchase merchandise in order to obtain additional chances. However, it is my opinion that by inserting said requirement in said Ch. 63-553, the legislature evidenced its intent that no person should be required to purchase anything in order to obtain either one chance or additional chances to be selected to receive the gift; that full and complete participation should not depend on making a purchase; and that no person's chance of being selected should be enhanced by buying anything. Beyond doubt, this intent would be defeated by holding that program 2 is authorized by said Ch. 63-553, and my conclusion is that it is not so authorized.

063-125—October 22, 1963

TAXATION

SEPARATE ASSESSMENT OF MINERAL, OIL, GAS AND OTHER SUBSURFACE RIGHTS IN OR TO REAL PROPERTY—§193.221(1) AS AMENDED BY CH. 63-355, LAWS OF FLORIDA

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

When may mineral, oil, gas, and other subsurface rights in or to real property in this state be assessed separate and apart from the fee title to the realty itself?

"Under Florida taxing statutes the levy and assessment (of ad valorem taxes) is on the realty itself, at its full cash value, regardless of the existence of estates in it," (the realty) in the absence of contrary constitutional or statutory provisions. (Ban-

croft Inv. Corp. v. Jacksonville, 157 Fla. 546, 27 So. 2d 162, text 167).

Section 193.221(1), F. S., as amended by Ch. 63-355, provides that:

Whenever the mineral, oil, gas, and other subsurface rights in or to real property in this state shall have been sold or otherwise transferred by the owner of such real property, or retained or acquired through reservation or otherwise, such subsurface rights shall be taken and treated as an interest in real property subject to taxation separate and apart from the fee or ownership of the fee or other interest in the fee. Such mineral, oil, gas and other subsurface rights, *when separated from the fee, or other interest in the fee*, shall be subject to separate taxation, when returned for taxation by the *owner of the fee, or other interest in the fee*, or the owner or claimant of such subsurface rights or interests, or any person, firm, or corporation claiming by, through or under the subsurface owner or claimant. Such taxation shall be against such subsurface interest and not against the owner or owners thereof or against separate interests or rights in or to such subsurface right. (Emphasis supplied.)

It is evident that the said 1963 amendment was enacted by the legislature to overcome the objections to said §193.221, F. S., raised by the supreme court of Florida in *Cassady v. Consol. Naval Stores Co.*, 119 So. 2d 35, wherein said §193.221, F. S., prior to the said 1963 amendment, was held unconstitutional. Section 193.221(1), F. S., prior to the said 1963 amendment, provided that:

Whenever the mineral, oil or other subsurface rights in real property, not to include a leasehold interest in said subsurface rights, shall have been sold or otherwise transferred by the owners of the fee, or acquired by reservation, such rights shall be taken and treated as real property and shall be subject to taxation separate from the fee; provided, however, that such subsurface rights shall be assessed as separate property and separate from the fee, and it *shall be the duty of the owner of such subsurface rights to make separate return thereof for taxation by the first day of April*. If a return is not made by the owner of the subsurface rights, the duty is hereby imposed upon the tax assessor to assess said separate subsurface rights for taxation and place it upon the tax rolls; *provided that such separate assessment shall be required only when the owner of some record interest in said lands shall file with the tax assessor of the county, prior to April 1 of the year a written request for such separate assessment of such mineral, oil or other subsurface rights*. Upon such subsurface rights being placed on the assessment roll, notice thereof shall be given to owner thereof at his last known address, irrespective of whether a return was made by such owner or not. (Emphasis supplied.)

In said *Cassady v. Consol. Naval Stores Co.*, supra, the court held:

That statute providing for separate taxation of mineral rights when owned in fee simple separately from own-

ership of surface and providing that if return was not made by owner of subsurface rights duty was imposed upon tax assessor to assess such rights but that such separate assessment should be required only when owner of some record interest in the land filed a written request for such separate assessment constituted an unauthorized delegation of legislative power and was unconstitutional.

The court's objection to §193.221, F. S., prior to the 1963 amendment, that separate assessment was required only when *the owner of some record interest in the realty* returned the mineral, oil and other mineral rights for separate taxation, appears to have been overcome by the 1963 amendment of said §193.221, F. S. Such interests are subject to separate taxation, under the said 1963 amendment, "when returned for taxation by *the owner of the fee, or other interest in the fee, or the owner or claimant of such subsurface rights or interests, or any person, firm or corporation claiming by, through or under the subsurface owner or claimant.*" (Emphasis supplied.) It was clearly the legislative intention when the 1963 legislature adopted and passed Ch. 63-355, to meet the objections of the supreme court in *Cassady v. Consol. Naval Stores Co.*, *supra*.

Mineral, oil, gas and other subsurface rights in or to real property in this state may be assessed separate and apart from the fee title to the realty itself under §193.221, F. S., as amended, when returned for separate taxation by the owner of the fee, by the owner of an interest in the fee, by the owner or claimant of such subsurface right or interest, or by any person, firm or corporation claiming an interest by, through or under the subsurface owner or a claimant thereunder.

063-126—October 23, 1963

STATE BOARD OF HEALTH

LICENSING OF NURSING HOMES AS DEFINED IN §400.01—

APPLICATION OF §400.161 TO SAID TERM—CH. 400;

§§400.01, 400.13, 400.161, 401.12, 381.031(4), 381.411

AND 464.012, F. S.

To: Bjarne B. Andersen, Jr., Staff Attorney, Florida State Board of Health, Jacksonville

QUESTIONS:

1. Does a calling card of an individual containing the following phrases, "Home for Elderly Men and Women, Comfortable Private and Semi-Private Rooms," "Excellent Food—Nursing Care if Needed," "Florida License," constitute advertisements as prohibited in §400.161, F. S., if the individual so advertising is not licensed under Ch. 400, F. S.?

2. Do advertising signs of a "boarding-rooming house" located on the premises of the property containing the phrases "Rest Home for Convalescents," "Nursing Services Available" or "Aged Persons Accepted," constitute a violation of §400.161, F. S., if the individual so advertising is not licensed under Ch. 400, F. S.?

3. If an owner or operator of a "boarding-rooming house" requests visiting nurse services or private nursing services for three or more residents of said "boarding-rooming house," does this constitute the providing of nursing services as contemplated in §400.01(4)(c)

and (5), F. S.?

4. If three or more residents of a "boarding-rooming house" are served meals in their room or by tray in bed, does such service constitute "custodial service" as defined in §400.01(6), F. S., so as to require licensure under Ch. 400, F. S., as a home for the aged?

Chapter 400, F. S., relating to nursing homes, provides for such establishments to be licensed in such categories as "home for the aged," "home for special services," and "nursing homes." It appears that the necessity for this opinion has arisen due to the lack of a clear statutory distinction, not only between nursing homes and homes for the aged, but also the boarding-rooming house that may serve some of its roomers-boarders in bed or call a private nurse, presumably upon the order of a physician, to temporarily care for a resident (on an individual basis) in the house.

Section 400.01(1), F. S., defines a "nursing home" or "home" as a place where the owner or management provides *maintenance, personal care or nursing* for a period exceeding 24 hours for 3 or more persons who, by reason of illness, physical infirmity or advanced age, are unable to care for themselves. This definition also includes services to less than 3 persons by establishments that hold out to the public that they regularly provide nursing and custodial services.

Chapter 61-354 amended §400.01, F. S., and the foregoing general definition of a "nursing home" or "home" was made to apply to the 3 categories listed above. The 2 categories under consideration here are the "*nursing home*," which is a home that provides nursing services in addition to custodial services (§400.01-(4c)), and the "*home for the aged*" which merely provides domiciliary and custodial services (§400.01(4a)).

Custodial service entails observation of diet, sleeping habits, maintenance of a watchfulness over the general health, safety and well-being of the aged or infirmed (§400.01(6)). Although the statute does not define domiciliary services, in Words and Phrases, Vol. 13, we find that the words "domiciliary" and "resident," in their ordinary legal meaning, denote that a person has a permanent place of abode and are not synonymic with "visitor." Nursing services mean such services or acts as may be rendered by either registered or practical nurses as defined in §464.012 (Section 400.01-(5)).

The prohibition against unlicensed persons offering to the public either nursing home services or custodial services, *supra*, is found in §400.161, F. S., which makes it unlawful for any person to offer or advertise to the public in any way or by any medium whatsoever nursing home care or services or custodial services without being licensed under Ch. 400, F. S.

AS TO QUESTIONS 1 AND 2:

In view of the foregoing, it appears reasonable to assume that the statute contemplates that a nursing home shall provide nursing service as a regular part of the services offered; whereas, a home for the aged may not be required to offer nursing services on a regular basis.

It would further appear that persons, offering to the public the services that are stated in your first and second questions, should be licensed in the appropriate category of either a nursing home or home for the aged as provided in Ch. 400, F. S. From the

limited facts before us as to the actual services provided, we are unable to determine the category; although it would seem that if only domiciliary and custodial services are rendered and no regular nursing care is provided (except for a particular patient upon the order of his physician with the patient paying the bill), the establishment would fall more into the category of a home for the aged rather than a nursing home. Questions 1 and 2 are answered accordingly.

AS TO QUESTION 3:

I want to call your attention to AGO 053-282, which provides that a "rooming house" does not become a "nursing home" until its management undertakes to provide maintenance, personal care, or nursing for more than 2 persons who, by reason of illness, physical infirmity, or advanced age, are unable to care for themselves. (AGO 053-282 was rendered prior to the 1961 act, supra, which provided for the various categories of nursing homes.)

In attempting to reply to question 3, we are also confronted with insufficient facts to determine the question as to whether the boarding-rooming house actually provides nursing services or custodial services as defined in §§400.01(4)(c), (5) and (6), supra, which would bring it into one of the 3 categories which are required to be licensed under Ch. 400, F. S. However, it would appear that if the place is a bona fide boarding-rooming house which ordinarily furnishes only meals and lodging to its residents, and 3 or more of such residents may be taken sick, and upon the order of the attending physician or physicians, the manager of the house should call a private nurse or nurses to care for the sick residents on an individual basis (just as if they were in their own private homes), I do not believe that such an arrangement would fall within the requirement that both nursing and custodial services shall be provided by an establishment classified as a nursing home.

The same reasoning would apply to a request or call for visiting nurse services, which may only be provided upon the order of a physician for a medically indigent person who may be acutely or chronically ill or injured (§401.12(2), F. S.).

On the other hand, if a boarding-rooming house actually provides nursing or custodial services to 3 or more residents, or if it offers or advertises to the public by any means that regular nursing and custodial services are provided, even if the number of residents to whom such services are offered shall be less than 3 (§400.01(1), F. S.), it may come within the prohibition contained in §400.161, F. S. Question 3 is answered accordingly.

AS TO QUESTION 4:

If the serving of meals in the room or by tray in the bed of 3 or more residents is all the extra service rendered by the boarding-rooming house, I do not believe that such service alone constitutes custodial services as defined in §400.01 (6). Said section does not specifically deal with the mere serving of meals, but the *observation of diets, sleeping habits, maintenance of a watchfulness over the general health, safety and well-being of the aged or infirm*. I believe the foregoing answers question 4 as well as it can be answered from the facts before us.

Because the complete answers to the questions presented requires determination of questions of fact, your attention is invited to §400.13, F. S., and its reference to §§381.031(4) and 381.411, F. S. It would appear that the referenced enforcement and penalty sections provide ample authority for action by the state board of

health in the circuit court to determine the propriety of the operation of the purported nursing home facilities.

063-127—October 25, 1963

TAXATION

COMPENSATION OF OFFICE OF TAX COLLECTOR FOR DUTIES PERFORMED IN CONNECTION WITH SANITARY SEWER DISTRICTS—§§153.73(11), 153.53 ET SEQ., 153.01 ET SEQ., 193.65, F. S.; §7, ART. X, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What commissions or other compensation are county tax collectors entitled to for making collection of special assessments for the sanitary sewer districts under §153.73(11), F. S.?

The taxes or assessments authorized under and by §153.73, F. S., appear to be special assessments and not ad valorem taxes, and may be assessments for special benefits within the purview of §7, Art. X, State Const. It is provided in and by said §153.73(11), F. S., that:

All such special assessments shall be collected by the tax collector of the county in which the district is located at the same time as the ad valorem taxes of the district are collected by the tax collector of such county.

These special assessments are prepared and certified to the county tax collector, who is charged with their collection along with and at the same time as ad valorem taxes are collected. However, delinquent unpaid assessments are not sold and tax certificates issued therefor, as in the case of ad valorem taxes of the county, but are to be collected by foreclosures in equity. Such special assessments remaining unpaid on April 1 of the tax year would appear to become delinquent on said date and subject to foreclosure in a court of equity, that is, the circuit court of the county.

These special assessments are imposed by "water and sewer districts" created and established under and pursuant to §§153.53, et seq., F. S., known and referred to in said Ch. 153, F. S., as county water and sewer districts, the purpose of such statutes being similar to that of county water and sanitary sewer systems under §§153.01, et seq., F. S. In 84 C. J. S. 39, §3, it is stated that "special taxes are those which are levied for a special or local purpose for the benefit of a part only of the body politic, and which rest on the assumption that a portion of the public is specially benefited in the increase of value to the property of the persons against whom the tax is levied." (Emphasis supplied.) See also definitions of "special tax" in 39A Words and Phrases, pp. 372-376.

We are of the view that the taxes or assessments imposed under and pursuant to §153.73, F. S., are in the nature of special taxes as defined by the above authorities, and within the purview of §193.65(2), F. S., unless otherwise provided in some other applicable statute or law.

063-128—October 28, 1963

TAXATION—MOTORBOATS

CANCELLATION OF TAX ASSESSMENTS AGAINST MOTOR-
BOATS—CH. 63-550, LAWS OF FLORIDA; §200.24, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Will county assessors of taxes and county tax collectors incur any liability under §200.24, F. S., should they cancel 1963 assessments against boats heretofore subjected to ad valorem taxation?

In revised AGO 063-80 dated Aug. 15, 1963, prepared in response to your inquiry, it is noted that "From and after the effective date of the act, boats and vessels, having been classified as motor vehicles, are by the Constitution exempt from personal property taxes and this exemption is effective even though they might have been previously assessed and on the tax rolls. Thus, Chapter 63-550, Laws of Florida, nullifies and requires the tax collectors of the several counties to strike ad valorem taxes previously assessed against boats and vessels for the tax year 1963. . . ." (Emphasis supplied.)

The above pronouncement of the effect of the constitutional exemption from personal property taxes as it applies to boats and vessels pursuant to the provisions of Ch. 63-550, when distributed by the comptroller to each county assessor of taxes and county tax collector with the direction to comply therewith will operate to absolve said taxing officials from liability under §200.24, F. S., for striking ad valorem taxes assessed against boats and vessels for the year 1963 from the tax rolls for that year after such roll becomes final.

063-129—November 4, 1963

COUNTY SCHOOL SYSTEM

RESUBMISSION OF ISSUE FOR APPOINTMENT OF SUPER-
INTENDENT OF PUBLIC INSTRUCTION TO ELECTORATE
PURSUANT TO §2B, ART. XII, STATE CONST.,
AFTER REJECTION

To: Thomas D. Bailey, Superintendent of Public
Instruction, Tallahassee

QUESTIONS:

1. If the electors of any given county vote to retain the elective system of selecting a county superintendent of public instruction in a referendum election as presently provided for in §2B, Art. XII, State Const., could another election be called to reconsider this proposition?

2. If question 1 is answered in the affirmative what interval of time would be required before such an election could be held?

AS TO QUESTION 1:

Section 2B, Art. XII, State Const., provides:

County superintendent of public instruction; appointment in certain counties.—

(1) The county superintendent of public instruction shall be appointed by the county board of public instruction

in the counties of Alachua, Charlotte, Collier, Manatee, Orange, Lee, Monroe, Leon, Indian River, St. Lucie, Broward, Baker, Brevard, Hendry and Hillsborough wherein the proposition is affirmed by a majority vote of the qualified electors of any such county making the office of county superintendent of public instruction appointive.

(2) The board of public instruction of the county must request an election, which may be a special election or may be on the ballot of any regular primary or general election to be designated by the board of public instruction, and upon such timely request the board of county commissioners of such county will call such special election or cause to be placed on the ballot at such other election the proposition whether subsection (1) shall be effective in such county.

(3) Any county adopting the provisions of subsection (1) may after four years return to its former status and reject the provisions of this section by the same procedure outlined in subsection (2) for adopting the provisions thereof in the beginning.

In summary the above quoted provisions authorize the calling of an election in certain specified counties to consider the proposition of changing from an elective to an appointive school superintendent and further authorize the calling of a subsequent election 4 years after the first election in the event there is a desire to return to the elective system.

In those instances where the electors vote in favor of changing from the elective to the appointive system it would appear that the provisions of §2B(3), quoted above, would prohibit the calling of any election for reconsideration of the issue to return to the elective system until after the passage of 4 years.

Subsection (2) quoted above is, however, silent with regard to reconsideration of the issue in those instances where the electors do not vote in favor of changing from the elective to the appointive system. Subsection (2) merely provides that an election shall be called by the board of county commissioners upon presentation of a timely request by the county board of public instruction. This section does not, however, fix any specific date or time for requesting such election and places no limitation upon how often such an election may be held.

In construing acts of the legislature, legislative intent is the pole star by which we must be guided (*Ervin v. Peninsular Tel. Co.*, Fla., 53 So. 2d 647, *Smith v. Ryan*, Fla., 39 So. 2d 281, and Fla. State Racing Comm. v. *McLaughlin*, Fla., 102 So. 2d 574). It appears that it was the intent of the framers of this particular provision to provide for an election to consider the proposition of changing from an elective to an appointive school superintendent which might be held at any time the board of public instruction in its discretion determines appropriate, that is, until such time as the electorate votes in favor of changing to the appointive system after which the school board would be prohibited from requesting further elections until after the ensuing 4 years.

In construing the provisions of any law providing for a referendum election such provisions should be liberally construed and any doubt should be resolved in favor of the exercise of this right by the people. (AGO 052-242, p. 632, 1951-52 Biennial Report of the Attorney General, *State v. Dillon*, 32 Fla. 545, 14 So. 383, *Klein v.*

Scholtz, Fla., 87 So. 2d 406). The position taken here appears consistent with a previous expression of this office on an almost identical issue relating to the authority to resubmit the question on the issue of providing for a free public library as authorized by the former provisions of §150.09, F. S. (See AGO 042-471, p. 147, 1941-42 Biennial Report of the Attorney General.)

To summarize the answer to question 1 it appears the question should be resolved in favor of allowing the electorate to exercise its right as often as possible and accordingly this office is inclined toward the position that the provisions of §2B, Art. XII, State Const., permit reconsideration of the proposition where the electorate rejects the opportunity to change from an elected to appointed school superintendent. Accordingly, question 1 is answered in the affirmative.

AS TO QUESTION 2:

With regard to question 2, it would appear from the authorities cited in the answer to question 1 that an election to consider the proposition of changing from an elective to an appointive school superintendent could be called at any time the county board of public instruction deems it advisable and in the best interest of the citizens of the county and in the event the electorate does not vote in favor of changing from an elective to an appointive system school superintendent, then the matter might under the provisions of §2B, Art. XII, State Const., be reconsidered at such time as the county board of public instruction in its discretion deems it advisable to make appropriate request of the board of county commissioners.

While this office cannot predict how a court would rule on such a question it might be advisable for the county board of public instruction to give some consideration to the four-year limitation contained in subsection (3), quoted above, in connection with making a request for such reconsideration where the electorate does not vote in favor of the appointive system in the first instance. Question 2 is answered accordingly.

063-130—November 4, 1963

FIREMEN'S AND POLICEMEN'S PENSION TRUST FUNDS ELIGIBILITY FOR PARTICIPATION BY MEMBERS OF CITY DEPARTMENT OF PUBLIC SAFETY COMPRISED OF FIRE- MEN AND POLICEMEN—CHS. 175 AND 185; §§175.041, 185.35(2), 185.07, F. S.

To: *J. Edwin Larson, State Treasurer and Insurance
Commissioner, Tallahassee*

QUESTION:

In an instance where a municipality combines its fire and police departments into a department of public safety where the employees perform fire, law enforcement and other duties without distinction as to whether their responsibility relates primarily to law enforcement or fire protection duties, is said city eligible to establish a pension trust fund for policemen or firemen under the provisions of Chs. 175 and 185, F. S.?

Section 175.041, F. S., provides that:

There is hereby created a special fund to be known

as the municipal firemen's pension trust fund, *exclusively* for the purpose of this act, . . . (Emphasis supplied.) Section 185.03, F. S., provides:

There may hereby be created a special fund to be known as the municipal police officers' retirement trust fund, *exclusively* for the purposes provided in this chapter. . . . (Emphasis supplied.)

It would appear from the provisions of the above quoted statutes that firemen's and policemen's pension trust funds established under the provisions of Chs. 175 and 185, F. S., are to be exclusively established for the purposes of providing retirement benefits to policemen and firemen. However, where a city combines its police, fire and other protection forces into a department of public safety and the members thereof lose their individual identity as policemen and firemen it would not appear that they would be eligible to come within the provisions of Chs. 175 and 185 as presently written.

If, however, there were some way to break down the department of public safety into a fire section and police section so that the policemen and firemen could retain their identity as firemen or policemen, then it would seem that the firemen would be eligible to participate in the pension trust fund provided by Ch. 175 and the policemen eligible to participate in the pension trust fund provided by Ch. 185. Such designation as a member of the police section or the fire section of the department of public safety should not, however, serve to prevent the department of public safety from being totally effective and thus where need be a law enforcement officer although retaining his designation as a policeman could be called upon to perform fire protection duties and likewise the members of the fire section in order to maintain the total effectiveness of the department could be called upon to perform law enforcement duties. In each instance, however, the officers would retain their primary designation as members of the fire section or police section insofar as the application of Chs. 175 and 185 is concerned.

In such an instance where a city has a police and fire department consolidated into a single department of public safety where the police officers and firemen can retain their identity as law enforcement officers and firemen then it would appear under the provisions of §185.35(2) that said city would be eligible to participate in the tax distributions under Chs. 175 and 185 and thus both firemen and policemen could participate in the fund. In each instance the policemen would under the provisions of §185.07(2) and the firemen would under the provisions of §175.091(2) contribute 5% of their salaries into the fund which would be supplemented as provided for in Chs. 175 and 185, F. S. The members of the fire section would participate and receive benefits from the fund to the extent provided for in Ch. 175, F. S., and the members of the police section would participate in the fund to the extent authorized by Ch. 185, F. S. Your question is answered accordingly.

063-131—November 4, 1963

TAXATION

DOCUMENTARY STAMP TAXES—CONVEYANCE OF REAL
PROPERTY FROM U. S. TO HILLSBOROUGH COUNTY—
CH. 201; §201.02, F. S.; CH. 23338, LAWS OF FLORIDA, 1945*To: Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are conveyances of real property by the U. S. to port authorities established by the Florida legislature or under statutory authority subject to documentary stamp taxes under and pursuant to §201.02, F. S.?

Said §201.02, F. S., imposes a documentary stamp tax "on deeds, instruments or writings, whereby any lands, tenements or other realty, or any interest therein, shall be granted, assigned, transferred or otherwise conveyed or vested in the purchaser, or any other person by his direction. . . ." We find no provision in Ch. 201, F. S., exempting the state, its counties, municipalities, districts and agencies from the operation of said §201.02, F. S., or from other similar provisions of Ch. 201, F. S., or elsewhere.

In 82 C. J. S. 554 and 555, §317, it is stated that "the government, whether federal or state, and its agencies are not ordinarily to be considered as within the purview of a statute, however general and comprehensive the language of the act may be, unless intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication." To the same effect, see also 49 Am. Jur. 235, §14. "While a state may tax its own property, the presumption is always against an intention to do so, and such property is impliedly immune from taxation unless an intention to include it is clearly manifested." (84 C. J. S. 386, §200; see also 51 Am. Jur. 552-556, §§559-564; 31 Fla. Jur. 59 et seq., §§169, et seq.) This rule seems to be applicable to license, privilege, sales, use, excise, etc., taxes, at least as to governmental transactions and functions (53 C. J. S. 557-559, §29).

The U. S. being immune from taxation, including documentary stamp taxes, as aforesaid, conveyances from the said U. S. to port authorities are not subject to taxation under said §201.02, F. S., so that if there is any liability it must be that of the port authority. Under §4384, title 26, U. S. Code, as implemented by federal tax regulation 47.4384-1(3), although conveyances made by the U. S. and its agencies to a grantee are not subject to taxation against the U. S. as grantor, in the language of said regulation, "the transaction is not exempt from tax, and the non-exempt party to the transaction shall be liable for the tax." Said section 4384, title 26, U. S. Code, after stating that the U. S. shall not be liable for the tax, provides that the tax may be "collected by assessment from any other party liable therefor." The statutory federal rule above-mentioned appears to be the general rule under statutes and laws derived from the federal statutes. (See AGO 061-138, of Sept. 6, 1961; 1961-1962 AGO 231-234). Tax exemption here seems to depend on the tax exempt status of grantee port authority. To be tax exempt in its entirety from our documentary stamp taxing statutes, both the grantor and grantee must be tax exempt under the statutes and laws of Florida. Borrowing language from federal tax regulation 47.4384-1(d), above-mentioned, "where all parties to a trans-

action are states or political subdivisions thereof, acting in their governmental capacity, no tax shall be imposed," including the federal government and its agencies.

Although your request for opinion and the file handed us therewith makes reference to the "Tampa Port Authority," there being a port authority in Hillsborough county bearing the name mentioned, it is evident that the port district intended is the Hillsborough county port district, created and established by Ch. 23338, 1945, as amended and extended by subsequent legislation. In §4 of said chapter we find the statement that "said authority shall constitute a body politic and a body corporate; it shall have perpetual existence; its operation shall be deemed a proper governmental function." It is governed by an authority consisting of five members appointed by the governor of Florida. Under §6 of the said act the authority is given supervision of the submerged lands within its boundaries, with title vesting in the authority when the requirements of said section have been complied with; and such lands may be sold when approved by a majority of the qualified voters of the said district. Under §7 of the said act the authority has the power of eminent domain, as to property needed for port district functions.

The board of commissioners of the Port of New Orleans has been held to be a governmental agency in *Hartwig Moss Ins. Agency v. Board of Commissioners, etc.*, 206 La. 395, 16 So. 2d 178, text 181, citing three other Louisiana cases holding the same thing. See also *Miller v. Port Authority*, 18 N. J. Misc. 601, 15 A. 2d 262; *People v. Davis*, 277 N. Y. 292, 14 N. E. 2d 74, text 76; *Morris County Indus. Park v. Thomas Nicol Co.* 35 N. J. 522, 173 A. 2d 414, text 417 (turnpike authority); *State v. Jacksonville Expressway Authority, Fla.*, 139 So. 2d 135 (referring to the authority as a state agency); *St. Regis Paper Co. v. New Hampshire Resources Board*, 92 N. H. 164, 26 A. 2d 832, text 836, (holding the said board to be a state agency). It, therefore, appears that the Hillsborough county port authority is a state governmental agency.

The port authority being a governmental agency, a conveyance of real property from the U. S. to the said authority is not subject to documentary stamp taxes either as to the grantor or the grantee.

063-132—November 5, 1963

TAXATION

ADMISSION TAXES—MEMBERSHIP SUBSCRIPTIONS IN PHILHARMONIC ASSOCIATIONS, LITTLE THEATRES, ETC.—§§212.02(16), 212.04, F. S.; CH. 63-526, LAWS OF FLORIDA

To: *John D. Moriarty, Assistant Director, Florida
Revenue Commission, Tallahassee*

QUESTION:

In light of Ch. 63-526, amending §§212.02(16) and 212.04, F. S., are admissions and membership subscriptions to philharmonic associations, little theatres and similar organizations exempt from taxation?

Chapter 63-526 amended §§212.02(16) and 212.04, F. S., to read as follows:

212.02(16) The term "admissions" shall mean and

include the net sum of money after deduction of any federal taxes for admitting a person or vehicle or persons, to any place of amusement, sport or recreation, or where there is any show, game or exhibition and where any charge is made by way of sale of tickets, gate charges, seat charges, box charges, season pass charges, cover charges, greens fees, *all dues paid to private clubs providing recreational facilities, including but not limited to golf, tennis, swimming, yachting and boating facilities; but specifically excluding civic, fraternal and religious clubs and organizations, participation fees, entrance fees, or other fees.*

212.04 Admissions tax; rate, procedure, enforcement, etc.—It is hereby declared to be the legislative intent that every person exercising a taxable privilege who sells or receives anything of value, by way of admissions and that every person who sells admissions to any place of amusement, *sport or recreation*, or for the privilege of entering or staying in any place of amusement, *sport or recreation*, including but not limited to theatres, outdoor theatres, shows, exhibitions, games, races, or any place where charge is made by way of sale of tickets, gate charges, seat charges, box charges, season pass charges, cover charges, *greens fees, participation fees, entrance fees or other fees*, or receipts of anything of value measured on an admission or entrance or length of stay, or seat box accommodations, in any place of business or where there is any exhibition, entertainment, *amusement, sport or recreation*, shall be subject to a tax for the exercise of such privilege. *There shall be exempt all admissions to athletic events held by elementary, junior high schools, deaf and blind school and state correctional institutions.* Provided, however, that no municipality of the state shall hereafter levy an excise tax on admissions. The taxes imposed by this section shall be collected in addition to the admission tax collected pursuant to §550.09, but the amount collected under §550.09 shall not be subject to taxation under this chapter. For the exercise of said privilege a tax is levied as follows:

(2) The sale price or actual value of admission shall for the purpose of this chapter, be that price remaining after deduction of federal taxes, if any, imposed upon said admission and the rate of tax on each admission shall be according to the brackets established by §212.12(10), F. S.

Provided that no tax shall be levied as to admissions to athletic events engaged in by high schools, junior colleges and institutions of higher education in the state until December 26, 1963.

(The italicized portions of the act were those added by the 1963 legislature.)

At the outset, it is noted that admissions to philharmonic associations, little theatres, and similar organizations, as well as membership subscriptions thereto, have since the enactment of the Florida sales and use tax in 1949 been administratively construed to be exempt from the tax.

The authority for this exemption seems to be bolstered by the 1963 amendment to the act, due to the specific exemption from the definition of admissions of "civic, fraternal and religious clubs

and organizations. . . ."

It is also noted that under the federal admissions tax in 26 U.S.C.A. §4233(7) philharmonic associations, little theatres and similar organizations are exempt from the federal tax on admissions.

I have examined the charter and by-laws of the Tampa Philharmonic Ass'n, Inc., and the Tampa Little Theatre, Inc., and find that these organizations are corporations not for profit dedicated to cultural pursuits and specifically prohibit any person or group of persons from gaining a pecuniary advantage or profit from the operation of the organizations. This opinion relates only to organizations of similar make-up, which are dedicated to cultural pursuits not for profit.

The contribution to the cultural life of the various communities of the state by organizations similar to those described above are of common knowledge and the recognition of the contribution performed is found in the exemption of these organizations from virtually every form of state and federal taxation. Thus, if we determine admissions and membership subscriptions to be taxable, it would be in conflict with the previous administrative construction of the statutes, as well as the theory of taxation evidenced by the various state and federal taxing programs. An examination of the statute, as amended, fails to reveal any intention on the part of the legislature to depart from the previous exemption afforded to organizations such as described above.

Thus, admissions and membership subscriptions to philharmonic associations, little theatres and similar organizations are exempt from taxation under Ch. 212, F. S., and your question is answered in the affirmative.

063-133—November 5, 1963

MOSQUITO CONTROL

AUTHORITY OF DISTRICT TO PURCHASE AIRPLANE AND TO LEASE SAME TO OTHER DISTRICTS—CHS. 61-2394, 57-1520, LAWS OF FLORIDA; CH. 388, §§388.011, 388.231(1), 388.271, F. S.

To: Bruce J. Scott, State Representative, Fort Myers

QUESTION:

May the Lee county mosquito control district purchase an airplane for use in connection with mosquito control and, when not needed for use in said district, lease same to other districts of a like or similar nature?

The said mosquito control district was organized and established by Ch. 61-2394. However, there appears to have been a prior mosquito control district, embracing all or a material part of that incorporated in 1961, which existed under Ch. 57-1520, which is evidently the act intended to be repealed by §21, Ch. 61-2394, and it is indicated in §20 of said Ch. 57-1520, that several local mosquito control districts may have been replaced by the one created in 1957. Under §9 of said Ch. 61-2394, the board of commissioners of the said district created under and by said Ch. 61-2394, is required to "perform all duties necessary for the control and elimination of mosquitoes and other arthropods of public health importance, in said county, and the board is authorized to provide for

the construction of canals, ditches, drains, dikes, fills and other necessary works, and to install and maintain pumps, excavators, and other machinery and equipment, and may also employ oils and chemicals and all other means and methods, and *do any and all things that may be necessary to eliminate and control mosquitoes and arthropods in Lee County.*" (Emphasis supplied.)

Section 11 of said Ch. 61-2394 requires the adoption of an operating budget for the operation of the district, "covering its proposed operation and requirements for the ensuing year." This budget is required to make provision for the payment of bonded obligations, if any, the payment of debts, for construction, for land acquisition and for operation of the district and the maintenance of its works. The district is financed by a tax levy as provided in §13 of said Ch. 61-2394 and otherwise as provided by law. We find nothing in said Ch. 61-2394 declaring that applicable general statutes and laws shall not apply to the said district, or for that point, that they shall apply. We find no provision in said chapter repealing laws in conflict with the said Ch. 61-2394, or otherwise.

In *St. Petersburg v. Pinellas County Power Co.*, 87 Fla. 315, 100 So. 509, text 510, Ch. 4600, 1897 (§§1925-1939 R. G. S., 1920), regulated the establishment of power plants by municipalities and contained a provision requiring the purchase of any existing plants that may be adversely affected by such establishment. Chapter 6772, 1913, being the legislative charter of the city of St. Petersburg, regulated the establishment of any power plant by that city, but contained no provision relative to existing power plants owned by other than the city. The city contended that Ch. 6772, 1913, being complete within itself, did not require that it purchase the plant owned by the power company. The power company contended that the provision in Ch. 4600, 1897 (a general law) was applicable notwithstanding said Ch. 6772. The court held that the provision requiring the purchase of the power plant was not actually in conflict with any provision in said Ch. 6772, and that both statutes should be read and construed together, holding that the city must purchase the power plant as required by said Ch. 4600. (See also *West v. Lake Placid*, 97 Fla. 127, 120 So. 361, text 367; *Abell v. Boynton*, 95 So. 507, text 509; *Apalachicola v. State*, 93 Fla. 921, 112 So. 618, text 620; *Phillips v. Altamonte Springs*, 92 Fla. 862, 110 So. 460, text 464.)

We find nothing in Ch. 388, F. S., declaring that it shall have no application to mosquito districts created and established by local acts, such as Ch. 61-2394. Section 388.011, F. S., as amended by Ch. 63-236, defines the districts to which Ch. 388, F. S., as amended, is applicable as "any mosquito control district established in this state by law for the express purpose of controlling arthropods within boundaries of said district." Section 388.231(1), F. S., as amended, provides in part that "no county or district shall lend or rent equipment so purchased to any other department within the county, or to any other county, district or any public agency or political subdivision of the state without the prior approval of the state board; nor shall it be so lent or rented without making a use or rental charge for the use thereof." This statutory provision is not in conflict with any provision in Ch. 61-2394, nor is there any provision in said Ch. 61-2394 in conflict therewith.

Under §5, Ch. 61-2394, the board of commissioners for Lee county mosquito control district is authorized to "purchase, hold, lease and convey such real estate, and personal property as said

board may deem proper to carry out the purposes of this law," and under §9 of said act "shall perform all duties necessary for the control and elimination of mosquitoes and other arthropods of public health importance in said county. . . ." Section 388.271, F. S., as amended by Ch. 63-236, provides that "all purchases of supplies, materials and equipment by counties or districts shall be made in accordance with the laws governing purchases by boards of county commissioners" (see §125.08, F. S.) unless the special laws creating such districts provide otherwise. No purchases should be made by the district unless and until provision is made in its budget as required by §11, Ch. 61-2394. These statutes and laws authorize the purchase of machinery and equipment needed and necessary for the proper control and elimination of mosquitoes and other arthropods of public health importance, when the requirements of such laws are conformed to, and what equipment needed and necessary is largely within the discretion of the district board, and the state board when their consent is required, taking into consideration all applicable factors.

The means and methods of controlling and eliminating mosquitoes and other arthropods of public health importance, doubtless by this time, are forming some pattern through use and application in the several counties and districts of the county. Whether the use of an airplane or any other type of equipment is necessary or advisable is a question of fact to be determined from the applicable facts in each particular case. Doubtless the state board of health would be of assistance in such cases.

The Lee county mosquito control district may, by and through its governing board, purchase an airplane for use in connection with mosquito control and of other arthropods in said district when it is officially determined that such an airplane is needed therein, with the advice and assistance of the state board of health, provided the requirements of the statutes and laws are conformed to and complied with. Such airplane and equipment may be leased or rented to other districts or counties when §388.231, F. S., as amended, is complied with and conformed to, pursuant to §388.381, F. S., and in cases of emergencies, pursuant to §388.351, F. S.

The foregoing comments are supplemental to our telegram of Oct. 18, 1963, which advised that the Lee county mosquito control district was without authority to lease its spray plane to other mosquito control districts around the state, under Ch. 61-2394, the act creating said mosquito control district. That telegram was in response to your Oct. 17, 1963, inquiry requesting the advice of my office "if it is lawful *under the law establishing the Lee County Mosquito to (sic) District to purchase a large DC3 Airplane for spraying to be leased for pay by other mosquito Districts around the State.*" (Emphasis supplied.)

In addition to our telegraphic response, we did on Oct. 18, 1963, furnish you a copy of AGO 058-311, which holds that mosquito control districts may, under certain conditions, perform arthropod work beyond the district boundaries.

The 1959 codification of the general law relating to mosquito control in this state, viz., Ch. 59-195, as amended by Ch. 63-236, presently provides authority for Lee county mosquito control district to engage in the activities contemplated by this opinion, notwithstanding the absence of such authority in the special act creating the district.

As noted in the Oct. 18 telegram, we find no authority for the

Lee county mosquito control district to purchase an airplane *solely* for the purpose of leasing said airplane to other mosquito control districts around the state for use in the arthropod control activities of such other districts; but there is said authority for leasing equipment of a district including an airplane owned by it to other mosquito control districts when such leasing is merely incidental to its use by the district owning it. In other words, when it is not needed or in use by the district owning an airplane the general law (Ch. 388) authorizes its lease to other mosquito control districts.

063-134—November 6, 1963

FIREMEN'S PENSION FUND

ELIGIBILITY OF PERSONS OTHER THAN FIREMEN TO PARTICIPATE—§175.032(1), F. S.

To: *J. Edwin Larson, State Treasurer and Insurance Commissioner, Tallahassee*

QUESTION:

Under the provisions of §175.032(1), F. S., may an administrative assistant, maintenance supervisor, mechanic, clerk, payroll clerk, typist, custodial worker, pipe fitter or stock clerk be classified as a fireman so as to be eligible to participate in the pension program authorized by Ch. 175, F. S.?

Section 175.032(1), F. S., provides in part:

Fireman means any duly employed uniformed fireman employed by any municipality or fire control district in Florida, whose duty it is to extinguish fires and to protect life and property therefrom as a member of a duly constituted fire department of each such municipality . . .

It would appear that §175.032(1) as quoted above, contemplates a person in the service of the fire department who is actually engaged in the business of extinguishing or preventing fires and none of those persons mentioned in your question as stated above would appear to fulfill those duties. See *Headley v. Sharp*, Fla. App., 138 So. 2d 536, wherein the 3rd district court of appeal was called upon to make similar distinction with regard to police officers under Ch. 185, F. S., which contains similar provisions relating to police officers. The only difference between that case and the instant situation was that the persons discussed in the court's opinion were actually performing law enforcement duties whereas in the instant situation those persons listed in the above question do not appear to be directly engaged in the business of fire prevention or protection.

Accordingly, this office would be inclined toward the position that the persons listed in your question would not, under the law as presently written, be eligible to participate in the municipal firemen's pension trust fund as contemplated by Ch. 175, F. S. Your question as set out above is answered in the negative.

063-135—November 7, 1963

TAXATION

EMPLOYEES RETIREMENT SYSTEM OF TOWN OF
SURFSIDE—TAX STATUS, INTANGIBLES—§1,
ART. IX, §16, ART. XVI, STATE CONST.;
§199.02(5), F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is the intangible personal property held by a trustee for the use and benefit of the retirement plan for employees of the town of Surfside, entitled to exemption from the ad valorem taxes imposed by Ch. 199, F. S.?

Section 1, Art. IX, State Const., contemplates the imposition of intangible personal property ad valorem taxes against all intangible personal property having its situs in Florida, "excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious or charitable purposes."

Section 16, Art. XVI, State Const., provides that the property of all corporations . . . shall be subject to taxation unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes. Under §199.02(5), F. S., "intangible personal property belonging to the state, or any political subdivision thereof, and intangible personal property belonging to any religious, charitable, benevolent, or educational association shall be exempt from taxation." We construe the phrase "political subdivision" used in said subsection (5) as including incorporated municipalities (see §1.01(10), F. S.).

The retirement plan for employees of the town of Surfside was established by ordinance 525, passed and adopted by the municipal council of the town of Surfside on Dec. 26, 1961, which ordinance consists of 22 sections and provides a comprehensive retirement plan under the supervision and control of a pension board, composed of the mayor, the town manager, the chief of the police department, the chief of the fire department and a councilman selected by the town council.

Retirement statutes and laws "have been generally upheld on the theory that the delayed payments are a part of the participant's compensation for services already performed and are not regarded as extra or increased compensation. . . ." (State v. Lee, 157 Fla. 62, 24 So. 2d 798, text 801; see also Voorhees v. City of Miami, 145 Fla. 402, 199 So. 313, text 316; Retirement Bd. of Allegheny County v. McGovern, 316 Pa. 171, 174 A. 400, text 404.)

In this case the retirement compensation appears to be a municipal obligation payable during retirement from a fund derived from municipal and employee contributions (§§10 and 11 of said ordinance 525). These funds are administered by or under the direction of a pension board (§15 of said ordinance 525) whose powers and duties are set out in subsection (b) of said (§15 of ordinance 525), one of which is to "recommend the appointment of a corporate trustee for the management, investment and safekeeping of the" said funds; said trustees recommended the Miami Beach First Nat'l bank to be trustee of the said funds. On March 9, 1962, the town of Surfside entered into a trust agreement with the said Miami Beach First Nat'l bank, which we are advised now holds the said retirement funds in trust for the uses and purposes men-

tioned in said ordinance 525 of Dec. 26, 1961.

Pension and retirement system trust funds from which municipal pension and retirement payments are made have been held to be public funds held for public purposes (*Aetna Cas. and Surety Co. v. Smith*, Del. 131, Atl. 168, text 176 and 177; *Cole v. Foster*, 207 Ga. 416, 61 S. E. 2d 814, text 817; *McCallum v. Moore*, 215 Ga. 705, 113 S. E. 2d 202, text 203; *Bowler v. Nagel*, 228 Mich. 434, 200 N. W. 258, 37 A. L. R. 1154, text 1158 and 1159; *Mahon v. Bd. of Education*, 74 N. Y. S. 174). It seems clear that municipal pension and retirement trust funds, to be used in connection with a municipal officers and employees retirement fund, including the one here under consideration, are in the nature of municipal property held for municipal purposes, the fund itself being entitled to tax exemption.

If the retirement fund in question was held and administered by the municipality through some board or agency, instead of through a trustee, so that legal title was vested in the municipality little question would arise as to the right of the fund to exemption from ad valorem taxes. The funds in the hands of the trustee are held by the trustee for and in behalf of the municipality and its said retirement system, merely a bare legal title being vested in the trustee. The municipal retirement system is the beneficiary.

The intangible personal property mentioned in the above-stated question being within the purview of §199.02(5), F. S., the above-stated question is answered in the affirmative.

063-136—November 13, 1963

TAXATION

DOCUMENTARY STAMP TAXES—DOCUMENTS EXECUTED ON MILITARY BASES IN FLORIDA BY MILITARY PERSONNEL TO MILITARY CREDIT UNION—\$201.08, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where documents within the purview of §201.08, F. S., are made and executed on military bases located in Florida, by service personnel to federal credit unions designed for such personnel, are such documents subject to documentary stamp taxes imposed by said §201.08, F. S.?

Specifically, navy service personnel based in Florida, to procure loans from their navy federal credit union, located in the Main Navy Bldg., 18th and Constitution Ave., N. W., in Washington, Dist. of Columbia, make arrangements for the procuring of such loans, making and executing promissory notes and other loan documents on navy bases in Florida, which promissory notes and other documents are transmitted to the said navy federal credit union, in Washington, supra, for acceptance by the credit union. When such loans are approved by the credit union checks are prepared and executed for delivery to the borrower in Florida.

Documentary stamp taxes are excise taxes on the written promise to pay (*Plymouth Citrus Growers Ass'n v. Lee*, 157 Fla. 893, 27 So. 2d 415). In this case it was held that a promissory note executed by the Plymouth Citrus Growers Ass'n, within this state, and mailed to Columbia bank for cooperatives of Columbia, S. C., a

federal agency, and by said bank accepted in South Carolina, was nevertheless subject to taxation under §201.08, F. S. So far as the court opinion shows, this promissory note was not made on a federal military reservation or other federal area in Florida, and was probably made at the office of the Plymouth Citrus Growers Ass'n in Florida.

"Territory ceded to the United States by a state, or sold to the United States by consent of the state for federal use, comes within the exclusive control of the federal government and is removed from the jurisdiction of the state for tax purposes, except to the extent that the state has reserved taxing power or the federal government has authorized taxation by the state of property within such territory." (84 C. J. S. 62 and 63, §12). In *Surplus Trading Co. v. Cook*, 281 U. S. 647, 50 S. Ct. 455, 74 L. ed. 1091, text 1098, the court held that "the supreme court of the state erred in holding that her tax laws could be applied to personal property within Camp Pike consistently with clause 17, Section 8, of Art. 1, of the Constitution, and therefore that the judgment of that court must be reversed." The taxable transaction mentioned in the above stated question occurred on a military base in Florida not subject to the taxing jurisdiction of the state, except as may have been reserved by the state at the time of cession of jurisdiction over the area or by congressional consent.

Although we find federal authority for the imposition of state excise taxes on the sale of gasoline and other motor fuels on federal military and other reservations (§104, title 4, U. S. Code), as well as sales and use taxes on sales made on such reservations (§105, title 4, U. S. Code), we find no like or similar act authorizing the states to enforce state documentary stamp taxes against persons making such documents on federal reservations, in the absence of congressional consent or reservation in the cession of state jurisdiction to the federal government or its agency. The attorney for the federal credit union is without authority to waive the rule against immunity from taxation by approving, or even requiring, the placing of state stamps on such documents made on federal reservations. This exemption from Florida stamp taxing statutes is not applicable where notes and documents are executed off military reservations.

063-137—November 13, 1963

METROPOLITAN DADE COUNTY CHARTER

ASSESSMENT AND COLLECTION OF SOUTH MIAMI TAXES
ON COUNTY TAX ROLLS—§§11, 22, ART. VIII, §5, ART. IX,
STATE CONST.

To: *George B. Hardie, Jr., City Attorney, City of South Miami*
QUESTION:

May the metropolitan Dade county charter, adopted under and pursuant to §11, Art. VIII, State Const., as amended in 1956, require that county and municipal taxes assessed in Dade county, be assessed on the Dade county tax rolls?

Among the powers authorized to the metropolitan government by §11, Art. VIII, State Const., as amended at the general election in 1956, is to:

Change the boundaries of, merge, consolidate and

abolish, and may provide a method for changing the boundaries of, merging, consolidating and abolishing from time to time all municipal corporations, county and district governments, special taxing districts, authorities, boards, or other governmental units whose jurisdiction lies wholly within Dade County. . . . (§11(1)(c), Art. VIII).

May provide a method by which *any and all functions or powers of any municipal corporation or other governmental unit in Dade County may be transferred to the Board of County Commissioners of Dade County. . . .* (Subsection (1)(d) *supra*).

May provide a method for establishing new municipal corporations, special taxing districts, and other governmental units in Dade County from time to time and provide for their government and prescribe their jurisdiction and powers. (Paragraph "e" of said subsection).

Section 11(5), after providing that no municipal or county charter or ordinance may conflict with provisions of the constitution or general law of Florida, provides for the enactment of local or special laws relating to Dade county only. It seems from the said metropolitan charter and §11, Art. VIII, State Const., that special and local laws may not be enacted by the legislature relating to Dade county only. The adoption of such local and special laws relating to Dade county only must be by metropolitan charter or county ordinances as the case may be, but not by the Florida legislature.

Section 5, Art. IX, State Const., provides in part that "cities and incorporated towns shall make their own assessments for municipal purposes upon the property within their limits," and §22, Art. VIII, of the said constitution that "the legislature may, by general, special or local act provide for the assessment of the taxes for any municipality by the county tax assessor of the county wherein such municipality is located and the collection thereof by the county tax collector of such county. . . ." Said §22 was adopted at the general election in 1954.

Several sections heretofore added to Art. VIII, State Const., by amendment, have consolidated or provided for the consolidation of county and municipal tax assessments and collections in Broward, Hillsborough, Pinellas, St. Lucie and Volusia counties, so that such a consolidation is not without precedent.

In the light of these constitutional provisions, we are of the opinion that §4.04(a) of the metropolitan charter of Dade county, consolidating county and municipal tax assessments and collections was authorized by the foregoing provisions of the Florida constitution, and that the above stated question is answered in the affirmative.

063-138—November 13, 1963

TAXATION

TAX RETURNS—REQUIREMENT TO MAKE GOVERNMENTAL AGENCIES—CONSTRUCTION OF CH. 63-342, LAWS OF FLORIDA (§192.062, F. S.)—§192.06, F. S.; §1, ART. IX, §16, ART. XVI, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Does Ch. 63-342 require that the state, counties, municipalities and other governmental agencies make ad valorem tax returns of the real and personal properties owned by them in the county as a condition to receiving tax immunity or exemption?

2. What was the legislative intent when it inserted the phrase "owned and used exclusively for governmental or religious purposes" in said Ch. 63-342?

The requirement of said Ch. 63-342 (§192.062, F. S.) is that "every person or organization who has the legal title to real or personal property which is entitled by law to exemption from taxation as a result of ownership and use, except property owned and used exclusively for governmental or religious purposes, shall before April first of each year file an application for exemption with the County Tax Assessor listing and describing the property for which exemption is claimed and certifying its ownership and use. . . ." (Emphasis supplied.)

In 82 C. J. S. 554 and 555, §317, it is stated that "the government, whether federal or state, and its agencies are not ordinarily considered as within the purview of a statute, however general and comprehensive the language of (the) act may be, unless intention to include them is clearly manifest, as where they are expressly named therein or included by necessary implication." (82 C. J. S. 554, §317; 3 Sutherland Stat. Constr., 3rd. Ed., 183, et seq., §6301; 49 Am. Jur. 235-237, §§14 and 15). Under these authorities the phrase "every person or organization," as used in said §192.062, F. S., should not be extended to the government and its agencies unless it otherwise appears from the context thereof that it is to be applicable thereto.

The court, in *Park-N-Shop, Inc., v. Sparkman*, Fla., 99 So. 2d 571, text 573, stated that "after a careful study of appropriate provisions of the Constitution and the statutes we decide that property of the state and of a county, which is a political subdivision of the state (Section 1, Article VIII) is immune from taxation, and we say this despite the reference to such property in Section 192.06(1) and (2) as being exempt." (Emphasis supplied.) Whether or not property of a municipal corporation is also immune from taxation was not decided in this case. We doubt that the property of municipal corporations is immune from taxation (*Gwin v. Tallahassee*, Fla., 132 So. 2d 273, text 276 and 277; *Sanders v. Jacksonville*, 157 Fla. 240, 25 So. 2d 648, text 651; *St. Augustine v. Middleton*, 147 Fla. 529, 3 So. 2d 153; *Smith v. Housing Authority*, 148 Fla. 195, 3 So. 2d 880, text 882; *Orange State Oil Co. v. Amos*, 100 Fla. 884, 130 So. 707; *Lakeland v. Amos* 106 Fla. 873, 143 So. 744, text 747; *Panama City v. Pledger*, 140 Fla. 629, 192 So. 470; *State v. St. John*, 143

Fla. 544, 197 So. 131, but feel that its property used for governmental purposes is tax exempt and that its property used for proprietary activities may under proper circumstances be subject to taxation.

The comment in *State v. St. John*, supra, (So. p. 134) indicating that a business "such as the generation and sale of electric light and power" by a municipality is not exempt from taxation, may have been overruled by *Gwin v. Tallahassee*, and *Sanders v. Jacksonville*, supra, at least to some extent. Properties held and used exclusively for religious, scientific, municipal, educational, literary and charitable purposes, in the light of §1, Art. IX, and §16, Art. XVI, State Const., and §192.06, F. S., are entitled to exemption from ad valorem taxation. In the light of the above-mentioned constitutional provisions we feel that the phrase "owned and used exclusively for governmental purposes or religious purposes," should receive the same construction as has the words "municipal" and "religious" purposes as used in said constitutional provisions.

Where the religious, scientific, municipal, educational, literary or charitable purposes carried on are clearly, openly and beyond reasonable doubt carried on on real property in this state, for example, a church house, a city hall, fire house, etc., a tax return would not seem to be required unless requested by the tax assessor as necessary for the proper description of the property or its use, or both. Unless a cursory examination of a parcel of property reveals its tax exempt status, its owner should return the same for taxation clearly demonstrating its right to tax exemption. A municipality's city hall, fire station, public library, and other properties whose right to tax exemption is clearly evident from a cursory examination would need no tax return to demonstrate their municipal use, and maybe their description. However, other properties, not clearly entitled to exemption from a cursory examination, should be returned for taxation.

AS TO QUESTION 1:

Properties of the state and counties being immune from taxation, a tax return is not required. However, a return of such properties, or the furnishing the tax assessor with descriptions of the state or county properties would in many cases assist the tax assessor in determining the exempt properties of the state and counties and often prevent errors in the assessment roll and the placing thereon and the extending of taxes against state and counties.

Although properties held and used exclusively for religious, scientific, municipal, educational, literary and charitable purposes, are tax exempt under §1, Art. IX, and §16, Art. XVI, State Const., as implemented by §192.06, F. S., this exemption is not based on ownership, as is the state and county exemption, but on both ownership and use so that the use of the property becomes an element of the right to tax exemption. This being true, it is necessary, except in those cases where the use is such as may be judicially known by a court, that the right to exemption be proven to the tax assessor by a tax return or otherwise. Many municipal properties, such as the city hall, the municipal jail, and other properties whose use is clearly municipal, are clearly tax exempt without a tax return. The use of other municipal properties may not be clearly exempt and require a tax return. Church houses, Sunday school educational buildings, and at least the larger

private schools may be such that their use for religious, educational, and other use is a matter of judicial notice, so that no tax return is required; tax returns should be filed in other cases. What was said about tax returns by the state and counties applies to the municipal corporations also.

AS TO QUESTION 2:

The phrase "owned and used exclusively for governmental or religious purposes," used in Ch. 63-342 (§192.062, F. S.) refers to the municipal and religious uses and purposes mentioned in §1, Art. IX, and §16, Art. XVI, State Const., as the same have been construed by the Florida courts. The constitutional requirement is that such property be "held and used exclusively for religious . . . (or) municipal purposes." This was the use contemplated by the above quoted language.

063-139—November 13, 1963

RETIREMENT

JUSTICES AND CIRCUIT AND APPEAL JUDGES—CH. 123
AND FORMER CHS. 121 AND 134, §123.03, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is a judge of a district court of appeal entitled to credit under the judges retirement act for the time served as assistant attorney for the state road department?

The facts as presented in your file indicate that the judge in question had been employed as assistant attorney for the state road department for almost three years prior to July 1, 1945. He is now a member of the judges retirement system and desires credit for this time served in the employ of the state road department. It will be assumed for the purposes of this opinion that the judge was not a member of either the state officers and employees retirement system (Ch. 121, F. S.), or the county officers and employees retirement system (Ch. 134, F. S.).

The above stated question poses the issue of whether the said person may now claim credit for such service under Ch. 123, F. S. Section 123.03, F. S., states in pertinent part as follows:

The total time spent by any supreme court justice or district court of appeal judge or circuit judge, electing to take the benefits of this chapter, as a state or county officer or employee prior to July 1, 1945, *without regard to previous membership in or contribution to any other retirement system for such period of time*, shall be added to and computed with such person's service as a supreme court justice or district court of appeal judge or circuit judge as provided by this chapter. . . . (Emphasis supplied.)

By the use of the above italicized words, the legislature intended that service rendered prior to July 1, 1945, be credited for retirement purposes.

Therefore, it is my opinion that the above question should be answered in the affirmative, and that the time served as assistant attorney for the state road department by the new judge of the district court of appeal be credited to said judge's account under the judges retirement act.

063-140—November 13, 1963

TAXATION

ESTATE AND INHERITANCE TAXES—NONRESIDENTS OF
FLORIDA—PROPERTY IN FOREIGN COUNTRY—§198.04,
F. S.; §11, ART. IX, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a resident of England dies leaving an estate valued, for purposes of estate and inheritance tax purposes, at \$355,393.48, with property in Florida having a value of \$97,939.48, with the remaining value in England, and an allowable credit against the federal taxes for state taxes paid of \$3,838.44, how should the Florida tax be calculated?

The valuations and credits mentioned were taken from your file handed to us with the request for opinion, and are subject to adjustments and final figures which should be used when making final calculations. No sovereign may exercise the power of taxation except as against property or subjects within its jurisdiction. (84 C. J. S. 222, §112). The decedent being a nonresident of Florida at the time of his death, only such of his property as has an actual tax situs in Florida may be subjected to the Florida estate and inheritance taxes, which for the purposes of this opinion, subject to final corrections and adjustments, is taken as having a taxable value of \$97,939.48. The amount allowable as against the federal taxes, presently stated to be \$3,838.44, but subject to final corrections and adjustments, does not fix the state tax, but merely the amount allowable by the federal government for state taxes legally assessed and paid.

Under §11, Art. IX, State Const., the state estate or inheritance tax may not exceed the "aggregate amounts which may by any law of the United States be allowed to be credited against or deducted from any similar tax upon inheritances, or taxes on estates assessed or levied by the United States on the same subject." The Florida inheritance or estate tax is levied by §198.04, F. S., in accordance with the said constitutional provision. This is the measure of the Florida tax that may be imposed on the said \$97,939.48, including any correction or adjustment thereof.

The federal credit allowed on federal estate and inheritance taxes for like taxes paid the several states is set out in §2011, title 26, U. S. Code. These observations answer the above stated question as well as the same may be answered until final valuations have been determined.

063-141—November 15, 1963

TAXATION

DOCUMENTARY STAMP TAXES—MODIFICATION AND
EXTENSION OF PROMISSORY NOTE—§199.11, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What amount of documentary stamp and class "C" intangible taxes are due on an agreement that modifies payment of the balance due on a promissory note, adds

an additional principal amount thereto, and provides for the payment of the combined principles in installments?

The "note and mortgage modification and extension agreement" in issue here was made and entered into Oct. 11, 1963, by and between a state banking institution and a husband and wife, residents of this state, and concerns a promissory note, in the principal sum of \$10,000, made by the said husband and wife to the banking institution, dated May 29, 1962, due and payable June 15, 1965, on which on or before said Oct. 11, 1963, payments had been made reducing the principal amount to \$5,833.45, which promissory note and obligation is secured by a mortgage, evidently encumbering real property. By said agreement of Oct. 11, 1963, the parties thereto agreed that they thereby amended and modified "by increasing the principal indebtedness from five thousand, eight hundred thirty-three and 45/100 dollars to ten thousand dollars, which balance and increase shall from and after the date of this agreement be payable in thirty-six consecutive monthly installments," 35 of \$277.77 each and 1 of \$278.05, each payable as therein provided.

A reading of the entire agreement of Oct. 11, 1963, shows an intention of the parties to extend the payment of the unpaid balance of the promissory note of May 29, 1962, that is, \$5,833.45, and to pay the additional advance of money, which by the said agreement of Oct. 11, 1963, is also to be secured by the mortgage of May 29, 1962, in installments of \$277.77 and \$278.05, as aforesaid, as provided in the said agreement of Oct. 11, 1963. This agreement, insofar as it relates to the unpaid balance of \$5,833.45, appears to be an extension of payments and not the creation of a new obligation within the purview of *Lee v. Quincy State Bank*, 127 Fla. 765, 173 So. 909, text 910, but if not within said opinion, it would seem to constitute a renewal of the obligation within the purview of §201.09, F. S., if the provisions thereof have been conformed to.

We here presume that intangible personal property taxes were paid under §199.11(3), F. S., upon the original promissory note, the unpaid balance of \$5,833.45 of this promissory note being extended as to payment instead of being made a new obligation, and the additional advance of \$4,166.55, being a new and additional obligation, only the said \$4,166.55 is liable for documentary stamp taxes and class "C" intangible personal property taxes.

063-142—November 15, 1963

DADE COUNTY HEALTH UNIT

**AUTHORITY OF BOARD OF COUNTY COMMISSIONERS TO
FIX SALARY OF DIRECTOR—APPROVAL OF STATE
BUDGET COMMISSION AND FLORIDA MERIT SYS-
TEM—CHS. 110, 154, 282; §§110.01, 154.02, 154.04,
216.171(3), 282.051, 282.092, F. S.; CHS. 26592, 1951,
61-401, 63-375, 63-514, LAWS OF FLORIDA; §11,
ART. VIII, STATE CONST.**

*To: Wilson T. Sowder, M. D., State Health Officer, Florida State
Board of Health, Jacksonville*

QUESTIONS:

1. Does the board of county commissioners of Dade

county have the authority to fix the salary of the director of the Dade county health unit?

2. If so, does such action require the approval of the state budget commission if the salary is paid out of county health unit trust funds?

3. Does such action require the approval of the Florida merit system?

Chapter 154, F. S., authorizes the several counties of the state to cooperate with the state board of health in the establishment and maintenance of full-time local health units therein. This provision indicates the establishment of county health units by the state board of health, the county cooperating. Section 154.04, F. S., provides: the director and other personnel of a county health unit "shall be employed by the board of county commissioners; provided, however, that no such personnel shall be employed by the board of county commissioners unless such personnel shall be approved by the state health officer. *The duties and compensation of said personnel shall be fixed and determined by the State Board of Health upon the approval of the board of county commissioners.*" (Emphasis supplied.)

Effect of Ch. 26592, 1951, on §154.04, F. S., supra—

Chapter 26592, which is a population act affecting counties having a population of not less than 325,000 according to the last preceding federal census, provides that the board of county commissioners of counties, which maintain a full-time county health unit, and director thereof in accordance with the statutes of the state, and *contribute not less than 70% of the total funds expended annually for the operation of such county health unit*, is empowered to fix the salary of the director thereof. The act further directs the state treasurer to pay such salary as may be fixed by the board of county commissioners out of funds in the budget of the county health unit. The act took effect on May 14, 1951, and repealed all laws in conflict.

Article VIII, §11, State Const. which provides home rule for the people of Dade county in local affairs, substantially provides that nothing in §11(5)(6) and (9), shall be construed to limit or restrict the power of the legislature to enact general laws which shall relate to Dade county and any other one or more counties of the state, and that all such general laws shall apply to Dade county; and further that such general laws shall supersede any part or portion of the home rule charter provided for in §11, or any ordinance enacted pursuant to said charter, when any part of the charter or any ordinance may be in conflict with such general laws.

In *Dade County v. The Mercury Radio Service and Company*, 134 So. 2d 791, our court said that under the constitutional provision regarding the Dade county home rule amendment, in case of conflict between county ordinances and statutes, the state statute is the dominant law.

A check with the office of secretary of state, the statutory revision department of the office of the attorney general and Shepard's citations reveals that Ch. 26592, 1951, has not been repealed insofar as it relates to Dade and Duval counties.

In view of the above, it is my opinion that Ch. 26592, 1951, may supersede or limit the application of §154.04, F. S., and permit the board of county commissioners of Dade county, Florida, to fix the salary of the director of the Dade county health unit, if

said county contributes not less than 70% of the total funds expended annually for the operation of such county health unit. Your first question is answered in the affirmative.

Re: State budget commission approval:

Effect of Ch. 63-375, 1963, on §282.051, F. S., 1961, as Am. by Ch. 63-514

Section 282.051(3) (b), F. S., 1961, as amended by Ch. 63-514, substantially provides that unless approved by the budget commission as being justifiable and in the best interest of the state, the annual rate of compensation of any state officer or employee shall not exceed \$12,500, except specifically authorized by law. (As to whether the personnel of county health units are state or county employees, see AGO 056-174, which held that they are state employees.)

In view of the point raised by the Dade county attorney in his memorandum number 63-215, which accompanied your request for the advice of this office; the point being that since §216.171(3) had been repealed, that approval of the state budget commission was not required, we will trace the history of §282.051, *supra*, which appears to be as follows: The foregoing provisions were formerly contained in §216.171(3) which placed a salary ceiling of \$10,000 per annum on state officers and employees without the approval of the budget commission; and the same Ch. 61-401 amended Ch. 282, F. S., 1959, by adding §282.051, F. S., 1961, which included substantially the same provisions in subsection (3b) thereof, that were formerly contained in §216.171(3). In 1963, the legislature enacted Ch. 63-514 which, among other things, amended §282.051(3b), F. S. 1961, by raising the ceiling from \$10,000 to \$12,500.

Chapter 63-375, an act relating to the disbursement of county health unit trust funds, amended Ch. 282, F. S., by adding §282.092 to read:

282.092. County health unit trust funds may be expended by the state board of health for the respective county health departments in accordance with budgets and plans agreed upon by county authorities of each county and the state board of health. *The limitations on appropriations set forth in section 282.051, Florida Statutes, shall not apply to county health unit trust fund.* (Emphasis supplied.)

Although Ch. 63-375, relating to the disbursement of county health unit trust funds, *supra*, became law June 12, 1963, and Ch. 63-514, relating to the limitation on salary appropriations without the approval of the state budget commission, *supra*, became law June 19, 1963, with an effective date fixed at July 1, 1963, I do not believe that the mere changing of the salary ceiling (in §282.051) from \$10,000 to \$12,500, and exempting salaries in the amount of \$15,000 for teaching and research personnel in our state universities is sufficient to exclude said Ch. 63-514 from the category of a "re-enacted statute," such a statute does not have the effect of repealing a prior act unless it does so by specific reference.

Inasmuch as the cardinal rule in construing statutes is the legislative intent, which must be given effect even though it may appear to contradict the strict letter of the statute. (*Singleton v. Larson*, 46 So. 2d 186; *Ervin v. Peninsular*, 53 So. 2d 647.) It appears that the intent of the legislature is to provide for the ex-

penditure of county health unit trust funds without the approval of the state budget commission.

Counties having public health units are authorized to levy an ad valorem tax on the taxable property in the county, which tax "shall be expended by the State Board of Health solely for the purpose of carrying out the intent and object of" Ch. 154, F. S., in such county (§154.02, F. S.). In addition to the county tax aforesaid, appropriations are made by the legislature from the general revenue fund of the state to assist in the operation of such county health units. *The county funds and the state funds allocated to the county become a trust fund in the state treasury for the payment, by state warrant, of the expenses for operation of the county public health unit.*

In view of the foregoing and upon being advised by the office of the comptroller that the salary of the director of the Dade county health unit is paid out of trust funds allocated to the Dade county health unit, it is my opinion that the approval of the state budget commission is not required for salaries in excess of \$12,500 which are paid from such funds. If all of the provisions of Ch. 63-375 are to be fully complied with, it is necessary to obtain the approval of the state board of health. Your second question is answered in the negative.

Re: Approval of Florida merit system—

Chapter 110, F. S., creates the Florida merit system and provides for the adoption of rules and regulations which shall include classification of positions, *the establishment of salary schedules*, minimum personnel standards for the position so classified and for *periodic payroll audits of such positions*.

Section 110.01, F. S., placed the state board of health under the merit system; therefore, the duties and compensations of the employees of the state board of health, which include the local health units, must be prescribed in accordance with the requirements of the laws and regulations controlling the Florida merit system. Since payments to such employees, without securing the approval of the Florida merit system, would constitute a violation of the merit system laws and regulations, the approval of the merit system would be required before such payments could be legally made (see letter dated Aug. 26, 1960, to county health officer William C. Ballard, St. Petersburg, Florida). As for the effect of the home rule charter for Dade county or ordinances adopted pursuant thereto, on state statutes, see Art. VIII, §11, State Const., *supra*.

In AGO 062-72, this office held that "When it appears to the State Comptroller that an employee or other person of a state board, commission, officer or agency, brought into the merit system provided by Chapter 110, Florida Statutes, *is being employed or compensated in violation of merit system statutes or duly adopted rules and regulations, he may not issue and deliver a warrant, for payment of the claim of such person wrongfully employed or compensated, to such employee or other person, unless and until it shall satisfactorily appear to said State Comptroller that such payment is clearly authorized by some valid and applicable statute or law notwithstanding said Chapter 110, Florida Statutes, or rule or regulation of the merit system.* In case of doubt the question should be resolved in favor of the application of the merit system statutes, rule and regulations."

I have been further advised by the Florida merit system that

a job description and salary range for county health officer has been prescribed by that agency and that its approval is required prior to making any change therein. (See also reclassification 282.021(33); and 282.051(3a).) Your third question is answered accordingly.

063-143—November 20, 1963

COUNTY SCHOOL FINANCES

CUSTODY, DISBURSEMENT AND NATURE OF SCHOOL LUNCH PROGRAM AND OTHER INTERNAL PUBLIC SCHOOL FUNDS—APPLICATION OF CH. 136, F. S.

—§§212.08(8)(a), 215.20, 215.22(22), 229.07, 229.08, 236.17, 236.171, 237.02(9), 237.32, 282.071, 501.04, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are school lunch program and other internal public school funds within the purview of Ch. 136, F. S., subject to the provisions and requirements of said statute?

Chapter 136, F. S., provides a system of county depositories and procedures for the custody, administration and distribution of county public funds and for the safekeeping of such funds. Section 237.32, F. S., provides a similar system of depositories and procedures for the custody, administration and distribution of county public school funds. These funds, as well as the county public funds mentioned in Ch. 136, F. S., are required to be deposited in county depositories provided or established under and pursuant to said Ch. 136, F. S., except where otherwise expressly provided by some other applicable statute or constitutional provision.

Under §§1751-1760, title 42, of the U. S. code, funds and materials are made available to the several states for use in school lunch and milk fund programs. Under §282.071, F. S., as amended by Ch. 63-337, federal funds appropriated by the U. S. congress for state use and purposes, whether in conjunction with state moneys or otherwise, are reappropriated for the purposes intended by the said congress of the U. S. Any moneys made available to the state of Florida for use in school lunch and milk fund purposes are made available by the state and its applicable agencies for the purposes intended. Item 416, §2, Ch. 63-300, (the 1963 general appropriations act) also reappropriates the said federal funds, together with possible state funds, to the proper state and county agencies to be used in carrying out school lunch and milk programs provided for in the federal and state statutes and laws. These funds appear to be within the purview of the order of circuit judge Ralph M. McLane of Feb. 6, 1963, in the case of *Polar Ice Cream & Creamery Company v. Board of Public Instruction of Escambia County*, lately pending in the circuit court of the first judicial circuit, in and for Escambia county, Florida. We agree with judge McLane's conclusion in this connection.

Section 236.171(1), F. S., provides:

A special school lunch program trust fund is created in the state treasury. This fund shall be known as the "special school lunch program trust fund." Custody and disbursement of said fund shall be in accordance with section 236.17, F. S.

Section 236.17, F. S., provides:

The State Treasurer shall be treasurer and custodian of all state funds for vocational education and rehabilitation, state textbook funds, and other state funds for the public school program. He shall receive and provide for the proper custody and disbursement of these funds in accordance with the provisions of law.

Under §215.22(22), F. S., such funds are not subject to the deductions mentioned in §215.20, F. S. Section 501.04(12), F. S., as amended by Ch. 63-188, takes away from the milk commission the power to fix wholesale and retail prices of milk furnished to public school lunch rooms; and under §212.08(8)(a), F. S., school lunches are exempted from the sales and use taxes.

Section 237.02(9), F. S., as amended by Ch. 63-376, provides:

The county shall be responsible for the administration and control of all local school funds derived by the school, including junior colleges, from all activities, including the school lunch program, or any other source, and shall prescribe the principles and procedures to be followed in administering these funds consistent with regulations adopted by the state board of education. The state board of education shall adopt regulations governing the procedure for the handling of the receipt, expenditure, deposit and disbursement of internal funds, which regulations do not necessarily have to comply with the requirements set forth in §237.02(1)-(8), F. S.

We do not deem the provisions of these subsections to be in conflict, in any way, with §236.17, F. S., *supra*, which relates to accounts in the state treasury, while §237.02(9), F. S., relates to accounts and funds at the county level.

The state board of education, under the authority vested in it under §§229.07 and 229.08, F. S., and otherwise, including §237.02, F. S., has adopted regulations numbered 130-1.85-130-1.191, inclusive, relating to the administration of school lunch and milk funds, as well as other internal moneys or funds of or administered by county educational agencies and authorities, which regulations have been examined by us, together with certain suggested and possible changes in said regulations because of Ch. 63-376, none of which appears to be contrary to the authority of the said board or to existing statutory and constitutional authority. Although these regulations seem to permit the deposit of school lunch and milk funds, as well as other internal funds of county public schools, in commercial banking institutions of the state and federal government, in accounts so long as such funds in a single account do not exceed \$10,000, without requiring security therefor as required by Ch. 136, F. S., this authority for deposit without the security mentioned in said Ch. 136, moves on the theory that the security of the federal deposit insurance is sufficient where the account does not exceed \$10,000. However, should the deposits in any such account at any time exceed the said \$10,000 in amount, applicable statutes and laws require that the amount in excess of said sum be secured by the deposits of bonds as required by said Ch. 136, F. S.

Should the school authorities advance such school lunch and milk funds to a school teacher, principal, or otherwise, to be used in the purchase of supplies for such school lunch and milk program, the same should take on the form of a revolving account

to be administered in accordance with rules and regulations of the local school board, unless and until such rules and regulations have been made a part of the regulations of the state board. Such advanced funds making up a revolving account, as well as the revolving account itself, should be adequately secured against misuse or mishandling.

In addition to conforming to the above requirements of the statutes and laws of this state, as well as the regulations of the state board of education, the requirements of any contract entered into between the state or its educational agency, concerning §§1751-1760, title 42, of the U. S. code and the requirements thereof must also be conformed to.

The above stated question is answered in the affirmative, subject to the above-mentioned statutes, rules and regulations applicable thereto.

063-144—November 26, 1963

(See clarification following this opinion)

REGULATION OF VOCATIONS AND PROFESSIONS

PHYSICIAN, OPTOMETRIST, OPTICIAN—FITTING AND ADAPTING OF CONTACT LENSES—CHS. 463, 484, §§463.01, 484.02, F. S.

To: *Dr. A. H. Rodriguez, Secretary, Florida State Board of Optometry, Tampa*

QUESTION:

May anyone other than a licensed physician or licensed optometrist fit or adapt contact lenses to the eyes and face of a patient without the physical presence and personal supervision of a licensed physician or a licensed optometrist?

In reaching a proper response to the foregoing question, it is first appropriate to examine the statutory definition of the practice of optometry. Section 463.01, F. S., in defining the practice states as follows:

Optometry and optometrist defined.—The practice of optometry is declared a profession, and, for the purpose of this chapter, is defined as follows, viz: to be the diagnosis of the human eye and its appendages, and the employment of any objective or subjective means or methods for the purpose of determining the refractive powers of the human eyes, or any visual, muscular, neurological or anatomic anomalies of the human eyes and their appendages, and the prescribing and employment of lenses, prisms, frames, mountings, orthoptic exercises, light frequencies and any other means or methods for the correction, remedy, or relief of any insufficiencies or abnormal conditions of the human eyes and their appendages. An optometrist is one who practices optometry in accordance with the provisions of this chapter.

It is readily apparent that the practice of optometry, as above defined, clearly encompasses the function of fitting or adapting contact lenses to the eyes and face of a patient. Inherent in the question propounded is the further query as to whether such

actions properly come within the realm of any other licensed professional practitioner. Our statutory provisions authorize the licensing of persons engaged in the field of opticianery by the provisions of Ch. 484, F. S. Opticianery is a field of skilled practice necessitating both training and learning of certain specialized technical skills which qualify such persons to prepare and dispense lenses and optical devices to the intended user on the written prescription of a physician or optometrist. While a dispensing optician is authorized under the provisions of §484.02, F. S., to duplicate lenses without prescription where such duplication shall be exact as to type, form and effective power, the optician is expressly prohibited by the cited section from attempting to determine the refractive powers of the human eye.

The question propounded and the collateral issues inherent therein thus resolve themselves into a determination of whether the function of fitting and adapting contact lenses to the eyes and face of a patient is one properly coming within the scope of the practice of optometry only, or whether the said functions relating to contact lenses also come within the scope of opticianery. Parenthetically, it should here be observed that there is no question but that a licensed medical doctor may perform the functions herein being discussed.

Understandably, the delineation of the respective fields of practice, i. e., optometry and opticianery, has not been without discord throughout the state and nation. Unquestionably, the desired delineation cannot be accomplished at first blush. By their very nature, the two fields of practice have certain common attributes or characteristics, yet, at once, optometry has certain attributes uncommon, and thus forbidden, to opticianery.

While the precise question has not been decided in this state in a reported case, I am informed that in three separate chancery actions in this state, the question has been considered and decided. In *Florida State Board of Optometry v. Huntington*, Case No. 59C 2179-D, circuit court of the eleventh judicial circuit of Florida, judge Grady L. Crawford, on Apr. 22, 1959, entered his final decree permanently enjoining the defendant from doing business as "Vent-Air" contact lens specialists . . . from duplicating or converting a contact lens from the lens of a regular or usual eyeglass prescription spectacle, without a prescription for such contact lens written by a licensed optometrist or medical doctor under the laws of Florida.

Subsequently, on June 20, 1960, in *Florida State Board of Optometry v. Cobb et al.*, Case No. 60C-2141, in the eleventh judicial circuit of Florida, circuit judge Irving Cypen entered a final decree against the defendants doing business in this state as Cobb Optical Company, Cobb Contact Lenses, and/or Cobb Opticians and Contact Lens Center enjoining them from:

1. (c) Fitting or otherwise prescribing the fitting of contact lenses in and for the eyes of patrons in his place of business; the technical fitting of contact lenses shall not be prohibited, provided that all such fittings shall be done only under the supervision of a licensed physician or licensed optometrist under the laws of Florida;

- (d) Making or fitting contact lenses on his patrons from ordinary eyeglasses or spectacles and without a new prescription specifically written by a licensed optometrist or eye doctor for such contact lenses, where in

the making and fitting of such contact lenses the same are not exact as to type, form or effective power as the eyeglasses or spectacles from which they were made and fitted;

(e) Doing or performing of any other act which would constitute the practice of optometry under Ch. 463, F. S.

Further, in *Florida State Board of Optometry v. Glaeser, d/b/a "Vent-Air" Contact Lens Specialists et al.*, Case No. 119574-C, in the thirteenth judicial circuit, judge L. L. Parks, on Dec. 9, 1960, entered his final decree enjoining the defendants from:

1. (c) Fitting or otherwise prescribing the fitting of contact lenses in and for the eyes of patrons in his place of business; provided, however, that the technical fitting of contact lenses shall not be prohibited if and when such technical fitting is done under the supervision of a licensed physician or licensed optometrist under the laws of Florida, but not otherwise.

It is notable that the defendants in each of the three Florida cases cited above were persons authorized by law to practice opticianery and of course involved what appears to be the precise question in respect of which you seek my opinion.

If the holdings arrived at in the above cited cases require further support by way of an appellate decision, the jurisprudence of our sister states can furnish such support. In *State of Oregon ex rel. v. Jack Kuzirian*, 365 P. 2d 1046 (1961), the court in holding that a dispensing optician was not qualified to fit contact lenses states the following:

There was testimony from all of the professional witnesses called that even if the lenses felt comfortable to the person wearing them that harm to the eye could still result. It was not disputed that only professional skill and judgment could detect the harm or the likelihood of harm. There was evidence to show that such harm could be serious. Defendant's own testimony that he urged all of his customers to return to their doctor for a final check and tests permits the inference that professional attention was essential.

There was other testimony which established that the mechanical tests for size and shape were not conclusive and that the peculiar nature of the lens and shape of each individual's eye required professional judgment as well as mechanical exactness. There was evidence that the curvature of the eyes, so essential to a proper fit, was not the same in any two persons.

In view of the above cited statutory provisions and case decisions, the question propounded is answered in the negative.

063-144—March 23, 1964

(Clarification)

REGULATION OF VOCATIONS AND PROFESSIONS

PHYSICIAN, OPTOMETRIST, OPTICIAN—FITTING AND
ADAPTING OF CONTACT LENSES—CHS. 463, 484;
§§463.01, 484.02, F. S.*To: Dr. A. H. Rodriguez, Secretary, Florida State Board of
Optometry, Tampa*

QUESTION:

The question which was the subject matter of Attorney General's Opinion No. 063-144 dated Nov. 26, 1963, was whether anyone other than a licensed physician or licensed optometrist fit or adapt contact lenses to the eyes and face of a patient without the physical presence and personal supervision of a licensed physician or licensed optometrist.

This question was answered by the said opinion in the negative.

Subsequent consideration reveals that there may exist considerable misunderstanding regarding the meaning and effect of the conclusion reached in AGO 063-144 concerning the physical presence and personal supervision of a licensed physician or licensed optometrist.

The functions relating to making, shaping, or grinding of the contact lenses preparatory to fitting and adaptation to the eye and prior to the actual initial insertion of the contact lenses into the patient's eye need not be performed in the presence of a physician or optometrist. Such preliminary functions can without doubt be performed by the optician as properly coming within his licensed authority. The need for the personal supervision or presence of the physician or optometrist arises when the lenses are fitted against the eye, and professional skill and judgment are exercised to determine whether the lenses are properly adapted to the eye itself. The latter function appears to require professional skill and judgment due to the peculiar nature of the lenses and shape of each individual's eye to determine proper fitting and adaptation of the lenses to the eye—a function going beyond the mechanical exactitude for which the optician is qualified by training and authorized by law.

It appears that such fitting and adaptation process is one which requires several or more visits by the patient to the practitioner over a period of time during which visits the practitioner exercises his professional skill and judgment in determining the appropriateness of the lenses in light of the reaction of the eyes to the introduction of a foreign object into the eye. From these observations, as well as the patient's subjective complaints, the professional practitioner determines whether modification of the lenses or the wearing schedule is required. It is the exercise of such professional skill and judgment which the statutes have reserved unto the physician and optometrist rather than the dispensing optician.

Accordingly, if clarification of AGO 063-144 is deemed necessary by those affected thereby, the same is hereby modified so

as to provide that the personal presence and supervision of a licensed physician or optometrist is not necessary while a duly licensed optician performs functions relating to the manufacture or grinding or shaping of contact lenses not requiring the exercise of professional skill and judgment necessary to the fitting and adaptation process of contact lenses to the eyes.

Subject to the foregoing modification and clarification of AGO 063-144, it is hereby reinstated.

063-145—November 26, 1963

REGULATION OF VOCATIONS AND PROFESSIONS

ARMORED CAR SERVICES—APPLICATION OF §§493.01,
ET. SEQ., F. S.—LICENSES AND LICENSE TAXES—
CH. 63-340, LAWS OF FLORIDA—CH. 323, F. S.

To: *Tom Adams, Secretary of State, Tallahassee*

QUESTION:

Are armored car owners and operators, holding certificates of public convenience pursuant to Ch. 323, F. S., and employing watchmen, guards and patrolmen to protect such cars and their contents, within the purview and operation of §§493.01, et seq., F. S., relating to watchman, guard and patrol agencies?

Chapter 63-340, 1963, provides for the regulation and licensing of those private investigative agencies, watchman, guard and patrol agencies, private detectives and watchman, guard and patrol contractors operating in this state, and makes such regulation and licensing a condition precedent to the operation of such businesses, professions or occupations in this state. Section 1 of said Ch. 63-340, 1963, defines private investigative agencies, watchman, guard and patrol agencies, private detectives and watchman, guard and patrol contractors for the purpose of said act and its enforcement. Section 2 of the said act makes the secretary of state of Florida the licensing and enforcement agency of said Ch. 63-340, providing in part that "no person, firm, company, partnership or corporation shall furnish private investigations, watchman, guard or patrolman services, nor shall he advertise, solicit nor in any way promise or inform any one that he will perform such services without (first) receiving from the secretary of state a license as provided herein." Section 3 of said Ch. 63-340 imposes an application fee of \$25 on each applicant under said section and requires an application in the form therein required.

Section 6 of said Ch. 63-340 imposes a license fee on each of the four classifications therein specified, and in the sums mentioned in said section, which fee is paid to the secretary of state.

Sections 8 and 9 of said chapter provide for the posting of a bond by the licensee and for the issuance of the required license. Section 11 of the said act sets out the services to which the act does not apply. Section 10 of the said act requires an annual renewal of the said licenses, the same to be in accordance with said section. The license fees mentioned in §6 of the said act appear to be applicable to all renewals. License fees collected are disposed of as provided in §18 of the said act, and appear to be revenue and not regulatory fees and replace the state license fees imposed under Ch. 205, F. S., but not the county and municipal

fees required by said chapter or by municipal charters and ordinances adopted pursuant thereto.

Private investigative agencies and watchman, guard and patrol agencies may include, according to the definitions of said phrases, any person, firm, company or corporation while the terms private detective and watchman, guard or patrol contractor appear to relate to individuals only. The term "watchman, guard or patrol agency" is defined in §1(2) of said Ch. 63-340, 1963, as meaning and including "any person, firm, company, partnership or corporation, engaged in the business of furnishing for hire watchman, guard or patrolman services and which employs one or more full-time or part-time watchmen, guards or patrolmen. An "armored car" is defined by Webster as "a motor car protected by armor," and which may be armed with a gun or guns. Present day armored cars, outside of the military services, are used extensively in transporting money, bonds, securities and other valuables to and from banks and safe deposit companies, from business houses to banks and vice versa, and other services for hire. Such armored cars often carry guards within the armored car, and doubtless in some cases have watchmen, patrolmen and guards following or preceding such armored cars as a measure of protection against attempts against such armored cars, as well as the contents therein.

In cases where such guards, watchmen, patrolmen and guards are the employees of the armored car owner and operator, employed by the armored car owner and operator merely as a means of protecting such armored car and its contents, such owner and operator would not be engaged "in the business of furnishing for hire watchmen, guard and patrolmen services," but would be protecting its own property and property carried by it for hire and would not be within the purview of Ch. 63-340. However, should such owner and operator hold himself or itself out to the public as furnishing for hire watchman, guard or patrolmen services to others, unconnected with protecting such armored car or its contents, such owner and operator would be engaged "in the business of furnishing for hire watchman, guard and patrol services" within the purview of Ch. 63-340, 1963.

Therefore, armored car owners and operators, holding certificates of public convenience pursuant to Ch. 323, F. S., and employing watchmen, guards and patrolmen to protect such armored cars and their contents, are not within the purview of §§493.01, et seq., F. S., (Ch. 63-340, 1963) relating to watchmen, guards and patrol agencies, so long as their watchmen, guards and patrolmen remain a part of the armored car services and no additional compensation is charged for the services of the watchmen, guards and patrolmen as such. However, should the armored car owners and operators furnish watchman, guard and/or patrolmen services to others for a fee or other compensation, then, to that extent, they would be within the purview of said §§493.01, et seq., F. S.

063-146—November 26, 1963

TAXATION

TAX EXEMPT STATUS OF PROPERTY LEASED AND USED
BY BOYS CLUB OF ORANGE COUNTY—§1, ART. IX, §16,
ART. XVI, STATE CONST.*To: Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where real property in this state, owned by a person, firm or corporation not entitled to tax exemption, is leased to a duly organized and active boys' club of this state, when will such property be entitled to exemption from ad valorem taxes, if at all?

The lease handed us with your request for opinion appears to encumber property which is described as the E $\frac{1}{2}$ of the NE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of a specified section in a specified township and range in a Florida county, such lease having been granted by the owners of such land to a duly organized boys' club, incorporated under and pursuant to the statutes of this state providing for and authorizing the incorporation of corporations not for profit. The lessors of this property, who are here presumed to be the owner of the fee title to said lands, are individuals; and the lessee is a nonprofit corporation. No governmental agencies appear to be involved in the said transaction.

The consideration, payable from the lessee to the lessors, for the use of the above described premises is "a rental payment of fifty and no/100 dollars on the first day of each month, beginning August 1, 1961 and ending on July 31, 1966," with an option for an additional five year term. It is also provided that the lessee "shall pay all taxes accruing on the property during the life of this lease that accrue subsequent to December 31, 1961." It is also provided that "the lessee is to obtain a tax exemption on said land." The said lease agreement contains an option to the lessee for the purchase of the lands for the sum of \$23,500, upon the terms mentioned in said lease agreement.

Section 1, Art. IX, and §16, Art. XVI, of the State Const., provide for taxation of real and personal property having a tax situs in this state. Said §1, Art. IX, authorizes the exemption of such real and personal property as may be exempted by the legislature "for municipal, education, literary, scientific, religious and charitable purposes." Section 16, Art. XVI, of the said State Const., provides that the property of all corporations, with certain exceptions not here involved, "shall be subject to taxation unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." These constitutional provisions have been construed by the Florida courts as limitations upon the power of the legislature to provide for the exemption from taxation of any classes of property except those particularly mentioned classes specified in said constitutional provisions. Before real and personal property may be exempted from taxation in this state, it must be held and used for some religious, scientific, municipal, educational, literary or charitable purpose or purposes, or two or more of such purposes. (See *L. Maxcy, Inc. v. Federal Land Bank*, 111 Fla. 116, 150 So. 248, text 250; *State v. St. John*, 143 Fla. 544, 197 So. 131, text 134; *State v. Doss*, 146 Fla. 752,

2 So. 2d 303, text 304; *Franks v. Davis*, Fla., 145 So. 2d 228, text 231). Said §16, Art. XVI, of the said State Const., requires that such property, in order to be entitled to exemption from taxation, *be held and used exclusively* for one or more of the purposes mentioned in the said section.

The right to tax exemption may not be determined alone by the character of its owner, or the charter of the corporation or association owning or using such property. The utilization of the property, not the character or nature of its owner, is the major criterion to be used in determining an owner's liability or non-liability for taxes. (*University Club v. Lanier*, 119 Fla. 146, 161 So. 78; *State v. St. John*, 143 Fla. 544, 197 So. 131; *Rast v. Hulvey*, 77 Fla. 74, 80 So. 750; *Lummas v. Florida Adirondack School*, 123 Fla. 810, 168 So. 232; *Simpson v. Bohon*, 159 Fla. 280, 31 So. 2d 406; *State v. Doss*, 150 Fla. 491, 8 So. 2d 17; *Riverside Military Academy v. Watkins*, 155 Fla. 282, 19 So. 2d 70). This being true, the charter of the lessee is of little, if any, assistance in determining the question of tax exemption for the leased property. The question of exemption of real and personal property is determined largely from the facts and circumstances involved in each particular case.

In this case, as in most if not all similar cases, the taxing authority must determine from all applicable facts and circumstances furnished by the taxpayer and ascertained by the taxing authority (the duty being on the property owner to demonstrate to the taxing authority that the use of the property is within the above-mentioned requirements) that the property in question is being held and used exclusively for one or more of the purposes mentioned in said §1, Art. IX, and §16, Art. XVI, of the State Const. If the taxing authorities find from all the applicable facts and circumstances that the property in question is held and used exclusively for religious, scientific, educational, literary or charitable purposes, and not for profit, either of the landowner or the lessee (the Boys' Club of Orange County, Inc.) then the property would be entitled to exemption from taxation, both as to the fee title and the leasehold interest; however, if either interest is not so held and used then that interest would be subject to taxation.

The taxing authorities may take into consideration the amount of rental being paid for the leasehold interest, together with the expenses to the landowner for upkeep, repairs, insurance and the like, in order to determine whether the rental by the landowner is for the purpose of making a profit on the lands, or for the purpose of reimbursement of expenses and costs, and not for profit. Although all interests in a parcel of real property are included in the assessment on the realty at its full cash value (*Bancroft Investment Corporation v. Jacksonville*, 157 Fla. 546, 27 So. 2d 162, text 167) this does not mean that interests held and used exclusively for one or more of the purposes mentioned in said §1, Art. IX, and §16, Art. XVI, of the State Const., may not be deemed as exempt when fixing the taxable value of the property itself. Here, if the leasehold interest be found to be tax exempt, and the remaining title of the landowner subject to taxation, the value of the leasehold interest should be deducted from the overall value of the real property in question.

Therefore, where real property in this state, owned by a person, firm or corporation, not entitled to tax exemption, is leased to a duly organized and active boys' club of this state, if the boys'

club is so operated so as to be for an exclusive religious, scientific, educational, literary or charitable use, then the leasehold interest held by such club would be entitled to tax exemption so that the value of such leasehold estate should be deducted from the overall value of the real property. However, both the leasehold interest and the interest of the landowner may be exempted if both interests are used exclusively for one or more of the above purposes mentioned in the constitution, and not for the profit of either the owner or the lessee.

063-147—November 27, 1963

RETIREMENT

CONSTRUCTION OF PHRASE "CONTINUOUSLY EMPLOYED"—§§122.03, 122.08, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What is the meaning of the phrase "continuously employed" as used in subsection (7) of §122.03, F. S., relating to state and county officers and employees retirement?

This question arises as to and concerns a state employee who became a state employee on July 1, 1946, but who appears to have rejected the then existing state officers and employees retirement system under Ch. 121, F. S., but prior to Ch. 23958, 1947, amending said Ch. 121, F. S., under which those entering state employment on or after July 1, 1947, were required to become members of the said retirement system.

Said Ch. 121, F. S., was merged with the county officers and employees retirement system under Ch. 134, F. S., by Ch. 29801, 1955, becoming Ch. 122, F. S., and the state and county officers and employees retirement system. Under §3 of said Ch. 29801, 1955, any officer or employee (state or county) who held office or was employed on July 1, 1945, or October 1, 1950, and who had been holding office or was *continuously employed* from April 1, 1955 (evidently those who had rejected the retirement systems) were permitted to claim prior service credits by making the payments required by said section. These provisions now appear as subsections (2)-(5) of present §122.03, F. S.

Section 122.03(2), F. S., provides that any officer or employee of the state or a county thereof, "who held office or was employed by the state or a county of the state on July 1, 1945, or October 1, 1950, and has been holding office or *has been continuously employed* from April 1, 1955, (a) may receive credit for prior service rendered subsequent to 1945, provided he pays into the retirement trust fund the amount he would have paid had he been a member since July 1, 1945. . . ." Section 122.03(3), provides: "any officer or employee claiming prior service under subsection (2) of this section shall make the required payment *on or before the time of actual retirement.*" (Emphasis supplied.)

Section 122.03(7), F. S., was added by §2, Ch. 57-363, 1957, providing that officers and employees holding office or employed "continuously from May 1, 1957," might claim previous service credits by complying with said subsection. Section 1, Ch. 59-303, 1959, changed the date of May 1, 1957 to May 1, 1959, retaining the

phrase "continuously from" Ch. 61-291, 1961, added to the initial paragraph of §122.03(7), F. S., the provision that "any officer or employee who holds office or is employed by a county of the state on June 1, 1961, and continuously employed," and the provision that "any officer or employee who holds office or is employed by the state or county after June 1, 1961, and who is continuously employed for three years, during which period of time no back payments may be made." Under §122.03(7)(b)(c), F. S., contributions for service claimed prior to July 1, 1955, is at the rate of 5% of compensation received, and after said date at the rate of 6% of compensation, both with interest at 3% compounded annually, said contributions to be made to the retirement trust fund "on or before the time of actual retirement." These references to "time of actual retirement" do not seem to contemplate the making of said contributions at the time of separation from service of the state or county, but as of the time of actual retirement. Under §122.08, F. S., any person with at least ten years of service credits may retire upon reaching the age of fifty-five (with reduced retirement pay) or the age of sixty. This section seems to contemplate the retirement of persons with ten years of service credits or more, upon attaining the age of fifty-five or sixty years of age, although their separation from service may have been many years prior to retirement. When we take into consideration the phrase "continuously employed" in subsections (2) and (7) of §122.03, F. S. (in their initial paragraphs) and the provisions in subsection (3) and paragraphs (b) and (c) of said subsection (7), that back contributions are not required to be paid until "on or before the time of actual retirement," we get the impression that the legislature contemplated *continuous employment until final separation from office or employment*, not *continuous employment until retirement*.

The specific employment here considered began on July 1, 1946 and terminated on Feb. 28, 1963. However, the employee in question did not become a member of the retirement system until July 1, 1958, some 12 years after employment. He was employed by the state on Oct. 1, 1950 and was continuously employed since April 1, 1955, within the purview of §122.03(2), F. S., until his separation from service. He was also continuously employed from May 1, 1959 and June 1, 1961, within the purview of §122.03(7), until separation from service.

We are, therefore, of the opinion that the phrase "continuously employed" as used in §122.03(7), F. S., relating to state officers and employees retirement refers to continuous employment until separation from office as distinguished from retirement. Retirement pay will not begin until formal retirement and payment of back contributions, and will not be retroactive to separation from office or employment.

063-149—December 2, 1963

COUNTY SCHOOL SYSTEM

COUNTY SCHOOL BUSES—LIGHTING EQUIPMENT—
 §§234.08, 234.081 (BY CH. 63-8, LAWS OF FLORIDA),
 317.481-317.591, 317.841, 317.902, 317.951, 317.952, F. S.;
 CHS. 63-8 AND 63-175, LAWS OF FLORIDA

To: *Thomas D. Bailey, Superintendent of Public
 Instruction, Tallahassee*

QUESTION:

May county boards of public instruction at their discretion install, or require the installation of signal lights, in addition to those required by §234.081, F. S., (Ch. 63-8, 1963) and any other applicable statutes, on school buses operated in their counties?

Said §234.081, F. S., as added by Ch. 63-8, 1963, requires that "every school bus in service shall, in addition to any other equipment and distinctive markings required by this chapter, be equipped with signal lamps mounted laterally as high as practicable, which shall be capable of displaying on the traffic side, to the front two alternately flashing lights . . . and on the traffic side to the rear two alternately flashing lights," in the colors specified in the said statute. Said Ch. 63-8 appears to have become a law on or about April 30, 1963, and was effective on and after July 1, 1963.

Chapter 63-175, 1963, amends §§317.481, 317.491, 317.501, 317.521, 317.531, 317.541, 317.571, 317.581, 317.591, F. S., relating generally to the lighting of motor vehicles operated over the roads, streets and highways of this state, which sections, together with other sections in Ch. 317, F. S., provide a comprehensive motor vehicle lighting code for the state of Florida. Said Ch. 63-175, 1963, became a law on May 27, 1963, and will become effective Jan. 1, 1964. Section 4 of said Ch. 63-175, 1963, provides that "all laws and parts of laws in conflict herewith are repealed." Should there be conflicting provisions between said §234.081, F. S., as added by Ch. 63-8, and said Ch. 317, F. S., as amended by Ch. 63-175, such provisions in §234.081, as amended, will be repealed by Ch. 317, F. S., as amended by Ch. 63-175, 1963, as of Jan. 1, 1964.

We feel that the lights required by said §234.081, F. S., as amended, will in fact (as of the effective date of Ch. 63-175, 1963) not conflict with Ch. 317, F. S., as amended by said Ch. 63-175, and may be upheld as additional lighting for school buses.

We seem to come to the question of the right of any person, firm, corporation, or county board of public instruction to equip motor vehicles, or require such vehicles to be equipped, with lights and lighting equipment not expressly required or permitted by said §234.081, F. S., or Ch. 317, F. S., above-mentioned. It is noted that §317.902, F. S., as amended, provides:

(1) no person shall drive or move any vehicle or equipment upon any highway with any lamp or device thereon displaying a red light or blue light visible from directly in front thereof, and that

(2) flashing lights are prohibited on motor vehicles except as a means of indicating a right or left turn or to indicate that a vehicle is parked or disabled upon the highway. Under §317.841, F. S., as amended, a motor vehicle may be equipped with not more

than one spot lamp, not more than two side cowl or fender lamps, not more than one running board courtesy lamp, one or more back-up lamps, not to exceed two fog lamps and not to exceed two auxiliary passing lamps. These lamps appear to be in addition to those lamps specifically required by the statutes. Section 317.952, F. S., as amended, provides that "the director is hereby authorized to approve or disapprove lighting devices and to issue and enforce regulations establishing standards and specifications for the approval of such lighting devices, their installation, adjustment and aiming, and adjustment when in use on motor vehicles . . ."

§317.951, F. S., as amended, requires the approval of any seat belt, head lamp auxiliary, fog lamp, rear lamp, signal lamp or reflector, required by said Ch. 317, F. S., as amended, which tends to alter or change the original design or performance of a motor vehicle, "unless of a type which has been submitted to the director (director of the Department of Public Safety) and approved by him."

From the above and foregoing it is evident that any additional light, including a signal light, to be added to those included in the equipment of a motor vehicle must in no way conflict with the requirements of §234.081, and Ch. 317, F. S., and must also conform to any regulations in this connection issued by the director establishing standards and specifications for motor vehicle lighting devices, their installation, adjustment and aiming under §317.952, F. S., as amended.

It is provided in §234.08, F. S., that each school bus "shall be equipped with adequate brakes, horn, lights, and such other equipment as may be required by regulations of the state board, all of which shall be maintained in good working condition," and that "each school bus shall meet with such additional specifications and standards which are in accordance with law and which, upon recommendation of the state superintendent, are prescribed by the state board as essential for the safe, comfortable and economical transportation of pupils."

From the above and foregoing we come to the conclusion that county boards of public instruction may, at their discretion, install, or require the installation of signal lights in addition to those required by §234.081, F. S., as amended, and Ch. 317, F. S., as amended, on school buses operated in their counties, only when they conform to regulations made by the state board of education, under §234.08, F. S., or by the director of public safety under §317.841, F. S., or with the approval of either or both, which regulations must not conflict with the provisions of said statutes.

063-150—December 6, 1963

CRIMINAL PROCEDURE

BAIL BOND—FAILURE TO FILE INFORMATION OR INDICTMENT; CANCELLATION—§§903.26(1), 903.31, F. S.

To: *John P. King, Clerk, Criminal Court of Record,
Jacksonville*

QUESTION:

Where a defendant has been bound over by a justice of the peace to the criminal court of record to answer a criminal charge, and where such defendant makes a bail bond to insure his appearance in said court, and where

no information is filed or indictment returned for such offense within six months after the arrest of the defendant, is the clerk of said criminal court of record authorized to issue to the surety on such bond a letter, certificate, or other document showing that the surety is released from liability by reason of the provisions of §903.26(1), F. S.?

Section 903.26(1), F. S., provides that:

(1) Before a bail undertaking is forfeited it shall be shown that (a) the information or indictment was filed within six months from the date of arrest, . . .

It is my opinion that said statutory provision prescribes, as an essential prerequisite to the forfeiture of a bail bond, that an information or indictment be filed within 6 months from the date of the arrest of the defendant posting such bond. When no indictment or information is filed within 6 months from the date of the arrest of the defendant, I consider that the court has no authority to order the defendant's bail bond forfeited; and that, since the obligation of such bail bond cannot be enforced by forfeiting the bond, the condition of the bond is satisfied within the contemplation of §903.31, F. S., which authorizes the making of an order canceling a bail bond when its condition has been satisfied.

However, said §903.31 does not authorize the clerk to make the order of cancellation authorized thereby, and, in my opinion, only the court can make such an order.

The law does not authorize a clerk to determine whether or not a surety's obligation on a bail bond has been satisfied by operation of law, that being a question to be determined by the court.

It follows that, in the absence of a court order canceling a bail bond under authority of §903.31, a clerk is without authority to furnish a surety any sort of documentary showing that his obligation on a bail bond has become terminated.

063-151—December 6, 1963

TAXATION

HOMESTEAD TAX EXEMPTION—ROW HOUSING—§§1, 7, ART. X, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Do one family structures built contiguous to each other using a party or common wall on property owned by different individual owners and having a common and contiguous roof qualify for separate homestead exemptions upon proper application by the individual owning the various parcels of property?

2. Do one family structures built separately but within 1/16 of an inch of each other and sharing a common and continuous roof on property owned by different individual owners qualify for separate homestead exemptions when properly applied for by the individuals owning the parcels of property involved?

3. Do one family structures built separately but within an inch from each other with roofs separated by 1/16 of an inch and constructed on property owned by

separate individual owners qualify for separate homestead exemptions when properly applied for by the persons owning the various parcels of property?

We are assuming for the purposes of this opinion that the owners and occupants of the housing structures mentioned and described in each of the above stated questions have "the legal title or beneficial title in equity to (the) real property" so described and that they "reside thereon and in good faith make the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon" them and that the real estate occupied by them does not exceed the homestead areas permitted under §1, Art. X, of the State Const., and that no such owner and occupant is claiming a homestead exemption from taxation in excess of \$5,000. We further presume that each such owner and occupant is entitled to homestead exemption on the homestead owned and occupied by him or her in some amount, subject to the requirement that such tax exemption "of more than five thousand dollars shall be allowed to any one person or on any one dwelling house . . ."

We are, for the purposes of this opinion, concerned only with the meaning and construction of "any one dwelling house" as used in said §7, Art. X, of the State Const. In *Overstreet v. Tobin, Fla.*, 53 So. 2d 913, the structures there involved were "so-called 'duplex' or two-story dwellings, each unit being owned in fee simple by separate owners, having separate plumbing and electrical wiring, separate entrances and walkways, and being connected only by an eight-inch party wall." By reference to the transcript in this case it appears that it was a class suit involving the owners of numerous duplex apartments differing but little in general design and construction, most of such differences being on the outside of the buildings to prevent all of them looking the same from the outside. There were no openings of any kind existing between the party wall from one apartment to the other. The duplex is so constructed that should the apartment be severed vertically there would have resulted two separate and independent buildings, separated only by the width of the severance cut. The party wall is constructed with eight-inch building blocks, extending from the foundation to the peak of the roof. Each apartment owner holds title to the part or area upon which his apartment unit is constructed, the boundary between the apartments being through the center line of the party wall, severing the same vertically. It seems evident from the transcript of this case on appeal that the party wall stops at the roof and does not sever it. There is no air space vertically between the two apartments of the duplex, each apartment abutting on the said party wall.

In *Gautier v. State, ex rel, Safra, Fla.*, App. 127 So. 2d 683, the building was a four unit apartment building, the appellees being the owner of one of these units and lands upon which located in fee simple, who resided thereon and made the same their permanent home. "The appellees purchased their home as a separate dwelling, received a separate deed, encumbered the same to a lending institution, and are assessed separately and apart from adjacent family owners." These dwelling units were separated from each other by party walls.

In the above cases the courts determined that each of the multi-unit buildings was, in itself, a "dwelling house" and refused to treat the separately owned units as individual "dwelling houses."

The courts in the aforementioned cases concluded that although the multi-unit dwelling was entitled to a full homestead tax exemption, same was to be divided between the several units located therein.

However, it is interesting to note that in *Overstreet v. Tobin*, supra, the supreme court observed that pertinent zoning regulations prohibited separate single-unit dwellings without a certain minimum footage between buildings. What view the court would announce in a case where zoning regulations permitted such construction is, of course, not presently ascertainable. However, in this regard we point out that the Honorable Tillman Pearson, judge, district court of appeal, third district, in his dissent from the majority decision in *Gautier v. State*, supra, observed at page 685:

... Where real property is described as a portion of a lot and block so that it may be separately assessed and levied upon, the incident that the building thereon has a party wall in common with a building on another portion of the lot and block does not, in ordinary language, deprive the first building of its character as a dwelling house. I would affirm in order to afford the Supreme Court an opportunity to re-examine the precedent.

However, in view of the supreme court's decision in the *Overstreet* case, supra, and the majority view announced in the case of *Gautier v. State*, supra, I am compelled to conclude that under the facts presented in your questions 1 and 2, each multi-unit dwelling would be entitled to a full homestead tax exemption, same to be apportioned among the separate units located therein.

Accordingly, your questions 1 and 2 are answered in the negative.

In regard to question 3, same reflecting that each unit is physically separated from the other without party wall or common roof, I do not believe that the rule announced in the *Overstreet* and *Gautier* cases, supra, would apply.

Thus, where zoning regulations permit the construction of separate dwelling units with a minimum of space between each and where there is an actual, physical separation between each unit, each of such units would constitute a separate dwelling house as contemplated by the State Const. and, therefore, would be entitled to a full homestead tax exemption.

Accordingly, question 3 is answered in the affirmative.

063-152—December 11, 1963

CLERKS OF CIRCUIT COURTS

FEE FOR RECORDING CONDOMINIUM DECLARATION—
CH. 63-35, LAWS OF FLORIDA, §§28.24, 711.08, 711.09, F. S.
To: J. Alex Arnette, Clerk, Circuit Court, West Palm Beach
QUESTION:

Is the clerk of the circuit court authorized a fee for the recordation of each page of a declaration of condominium?

A condominium is created by recording in the public records of the county wherein the land to be included is located a declaration executed with the formalities of a deed by all persons having title of record to such land, which declaration shall contain or provide a comprehensive description of all pertinent matters per-

taining to the condominium property. Certain information concerning the condominium may be attached as exhibits to the declaration itself (§8 (1), (2) and (3), Ch. 63-35).

When a properly executed declaration, together with all exhibits thereto, is recorded in the public records of the county where the land described in the declaration is located, the record thereof shall constitute constructive notice (§9 (1), Ch. 63-35).

The clerk of the circuit court is authorized, for the convenience of the clerk, to file or record the exhibits of a declaration separately with the notice of the place of the filing or recording upon the margin of the record of the declaration (§9 (3), Ch. 63-35).

Section 28.24, F. S., provides certain fees for the clerk of the circuit court for the recording of instruments by photographic process.

Inasmuch as the constructive notice to creditors, subsequent purchasers and all other persons stems from the recording of the declaration and exhibits thereto, it would appear that where the original exhibits to the declaration are recorded in the official records of the county, the clerk would be entitled to his fee for recording each page of any instrument other than by photographic process. In those instances where the declaration and exhibits attached thereto are to be recorded by photographic process and the originals returned, the applicable fee for the clerk of the circuit court should be computed on the clerk's fee for each page of not more than 8½ by 14 inches, as provided by §28.24, F. S., 1963.

Your question is answered in the affirmative.

063-153—December 19, 1963

CRIMES

LOTTERIES—NATION-WIDE SWEEPSTAKES—§§849.09, 849.092, F. S.—CH. 63-553, LAWS OF FLORIDA

To: *Edward M. Booth, County Solicitor, Jacksonville*

QUESTION:

Would the conduct of the following described sweepstakes program violate the lottery law?

STATEMENT OF FACTS:

A national wholesale concern, qualified to do business in Florida as a wholesaler, proposes to conduct a nation-wide sweepstakes advertising promotion program. In the operation of said contest, the contestants will have the prerogative of participating in said program by obtaining entry blanks from retail stores selling the wholesaler's products, and forwarding the entry blank with their name and address to the national concern with two empty packages of the wholesaler's product, or in the alternative, accompanying the entry blank with two sheets of plain paper with the promoter's product name printed thereon (printing may be done with pencil or pen and ink). Prizes will thereafter be awarded by random drawings and said prizes will be mailed to the holders of the winning entry blanks.

Prior to conducting this program, the promoter desires to obtain a retail store license under Ch. 204, F. S., in order to qualify under the provisions of Ch. 63-553, 1963.

Chapter 63-553, 1963 specifies that the provisions of §849.09, F. S., (making it unlawful to conduct a lottery), shall not be construed to prohibit or prevent persons who are licensed to conduct business under Ch. 204 or Ch. 208, F. S., from giving away articles of merchandise to persons selected by lot, if such gifts are made upon certain prescribed conditions. One of said conditions reads as follows:

(2) That the principal business of such licensee is the business permitted to be licensed under section 204.02 or under section 208.01, Florida Statutes; . . .

From the foregoing statement of facts, it appears that the national wholesale concern wishes to qualify to conduct give-away programs under Ch. 63-553 by obtaining a retail store license under Ch. 204.

A license can be obtained under Ch. 204 to operate a retail store but for no other purpose. If a national wholesale concern should set up a store in Florida under a retail store license obtained under Ch. 204, the business conducted under such license would not be the principal business of such national wholesale concern. Consequently, said national wholesale concern cannot meet the requirements of the above-quoted condition of Ch. 63-553 and therefore it could claim no protection under said chapter. In other words, the provisions of Ch. 63-553 would not apply to a give-away program conducted by such national wholesale concern even if it had a retail store license which it had obtained under Ch. 204.

Since Ch. 63-553 would not protect the national wholesale concern from the operation of the lottery statute, §849.09, the question arises as to whether said proposed sweepstakes program would violate §849.09. I think that it would.

There are three elements in a lottery, viz., (1) prize, (2) award by chance, and (3) consideration. It is apparent that the elements of prize and award by chance are present in said sweepstakes program. I think that the element of consideration is also present.

Entry blanks can be obtained only from retail stores selling the wholesaler's products. Inconvenience and travel expense are necessarily incurred by many participants in going to such stores for the purpose of obtaining entry blanks. Moreover, once people are in such stores, they are subjected to the sales appeal of the merchandise displayed therein. Also, it is logical to presume that such stores' sales of the wholesaler's products will be increased by sales to persons who go there for the purpose of obtaining entry blanks, to the resultant profit of the stores and the wholesaler. Therefore, in line with numerous opinions heretofore issued by me, I think that the requisite element of consideration is present in said sweepstakes program. This view is in line with the decision of the district court of appeal for the second district in the case of *Ed Blackburn, Sheriff, v. Jack Ippolito*, 156 So. 2d 550.

Consequently, I am of the opinion that the said proposed sweepstakes program contains all of the elements of a lottery and that it would violate §849.09.

063-154—December 20, 1963

TAXATION

VALUATION OF CORPORATE STOCK FOR TAX PURPOSES— STOCK NOT SOLD ON MARKETS—CHS. 199, §199.02(2), F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What elements of value should be taken into consideration when determining the value of corporate stock, not listed on any stock exchange or not regularly traded over the counter, for purposes of taxation under Ch. 199, F. S.?

It is provided in §199.02(2), F. S., that: "Shares of stock not listed on any stock exchange or not regularly traded over the counter, which are closely-held and for which no open market exists, shall be taxed at full book-value arrived at by addition of: a. capital stock, b. paid-in or capital surplus, (and) c. earned surplus and undivided profits. Such value shall be deemed the true taxable value; such book-value shall be determined as of the close of the corporation's fiscal year prior to January first of each year." The term "capital stock" is used in statutes and otherwise in more than one sense. It is used in some instances to designate the shares of stock in the hands of stockholders, sometimes as the fund of money or other property fixed as the basis for conducting the business of the corporation, and sometimes the property in which the capital stock of the corporation is invested. (18 C. J. S. 614, et seq.). "The terms 'capital' and 'capital stock' are frequently used interchangeably; however, the phrase 'capital stock' being employed to indicate the actual property of the corporation and the term 'capital' loosely in the sense of capital stock." (13 Am. Jur. 297, §172).

In *Atlantic and Gulf Railroad Company v. Allen*, 15 Fla. 637, text 660, the court remarked that: "As a general proposition it is true that the exemption of the capital stock of a company from taxation exempts the property to which that stock exists, for the plain and simple reason that the stock, when considered independent of that property, is nothing more than a valueless piece of paper." The statement is made in *Lewis State Bank v. Bridges*, 115 Fla. 784, 156 So. 144, text 145, that bank stock "is the property of the purchaser while capital stock is the property of the bank."

In 11 C. J. S. 521 and 522, *book-value* is defined as "the net worth of all corporate assets less all liabilities of the corporation; the value ascertained by deducting from the assets, carried on the books, the liabilities and other matters required to be deducted; the value as it appears from the books; the value as predicted on the market value of the assets of the company after deducting its liabilities." "Book value of bank stock is the net worth of all corporate assets less all corporate liabilities" (9 C. J. S. 89, §58, note 42). "When bank stock is to be sold at its 'book value' this value is arrived at by extending all the corporate assets on the corporate books, including accrued interest on notes not yet due, and deducting all liabilities and taking the balance as a measure of value." (9 C. J. S. 104, §64). See also 5 Words and Phrases 693, et seq., defining "book value."

It is evident that the definition of the "book value" of shares

of stock not listed on any stock exchange or not regularly traded over the counter, which are closely held and for which no open market exists, within the purview of said §199.02(2)(a)2., F. S., is in short the total assets of the corporation, less its liabilities. The reference in the statute to "capital stock" is not to the shares of stock outstanding, but to the capital account of the corporation, sometimes referred to as the working capital. Paid-in or capital surplus is the amount paid in, in excess of the par value of the corporate stock, whether in money or in property, as well as such surplus and undivided profits as may have been transferred to the capital account. Earned surplus and undivided profits seem to be what the terms used clearly indicate. In short, the "book value" of the property of a corporation, for purposes of valuation of its corporate stock for tax purposes, is the sum total of its assets less the sum total of liabilities at any time. Whether reserves are to be taken into consideration depends on whether they are reserves provided for the payment of present obligations.

With regard to reserves for the payment of taxes and other recurring obligations, including bad debts, they should not be deemed assets of the corporation where no more in amount than that reasonably necessary for the making of such payments, for purposes of valuing outstanding stock of the corporation, so long as such taxes and other recurring obligations, including bad debts, are not deemed obligations for the same purpose, and accrue not later than the next fiscal year, so that one balances off the other.

The above observations seem to answer the above stated question as well as the same may be here answered.

063-155—December 23, 1963

STATE OFFICERS AND EMPLOYEES

DUAL EMPLOYMENTS—SALARY OF BUDGET DIRECTOR—
 §§282.01(1) ITEM 5., 282.051, 340.06(17) (18).
 216.09, 216.10, 216.171(4), F. S.

To: *L. K. Ireland, Jr., Fiscal Analyst, Florida Legislative Council
 and Legislative Reference Bureau, Tallahassee*

QUESTIONS:

1. Does §1 of Ch. 63-300 place a maximum limitation of \$15,500 per annum from all sources on the salary of the budget director?

2. Does the budget commission have the authority to approve a salary in excess of \$15,500 per annum for the budget director?

3. Does the budget commission have the authority to approve the employment of the budget director in more than one capacity?

4. Does the budget commission have the authority to approve the payment of a salary to the budget director from more than one source?

The attachments to your letter indicate that on November 5, 1963, the Florida turnpike authority approved the payment of \$1,500 per annum to the budget director as consultant to the authority in addition to his compensation as budget director. The employment of persons as is deemed "advisable and necessary" is authorized by the provisions of §340.06 (17) (18), F. S., of the

Florida turnpike law.

According to the provisions of Item 5 of §1, Ch. 63-300, (General Appropriations Act) the legislature appropriated \$15,500 per annum as the salary for the position of budget director for the 1963-65 biennium. The provisions for the appointment of the budget director and his duties are set forth in §§216.09 and 216.10, F. S.

According to the provisions of §282.051, F. S., it is provided, among other things, that the annual salary of the officer filling a position specifically named in an item in the appropriation act shall be "*in the amount appropriated for such position,*" or "*within the amounts appropriated where such salary may be otherwise fixed pursuant to law.*"

We are therefore presented with a situation posing the question of whether, in addition to the salary fixed and appropriated by the legislature for the position of budget director, may the budget director receive compensation from another appropriation, to wit; from the funds of the Florida turnpike authority.

It is my understanding that the budget director is performing *additional* duties in acting as a consultant to the turnpike authority; duties *in addition* to those prescribed by §§216.09 and 216.10, F. S. I am further advised that the service he will perform as such consultant is to assist the turnpike authority in the general overall handling of its fiscal affairs, looking toward effecting economies, keeping its operations in harmony with the governing statutes, etc. These turnpike functions would require the services of someone skilled in fiscal management. They are different in scope from the statutory duties of the state budget director. The faithful performance of the two employments is presumed in law and does not admit of conflict. There are precedents and legal authority for such dual employments in the state, some of which are hereinafter outlined. We are advised that consolidation of such employments in one person ordinarily has not resulted in neglect of duties, conflicts, or overlapping of authority, but have usually been economical arrangements. Under such circumstances I do not see any legal impediment that would prohibit this additional compensation. In this regard, in AGO 058-131, I had occasion to construe a situation involving members of the milk commission representing both the state board of health and the state department of agriculture receiving compensation from more than one source and observed as follows:

The compensation prescribed by law for the performance of the duties of any public employment is presumed to be adequate and just for the proper performance of the duties of such employment. Such legal presumption persists even though, from time to time, additional duties or functions of the employment are added without an accompanying increase in compensation. *However, in the absence of a constitutional inhibition, the legislature may provide additional compensation for the performance of additional duties by a person holding public employment* see (43 Am. Jur. Public Officers, §363).

The said opinion also cites statutory provisions *authorizing* this additional compensation and recognizes the necessity of securing the consent and approval of the budget commission. I refer to the provisions of the then existing §216.171 (4) which

are presently to be found under \$282,051 (3) (d) and (e) as follows:

Limitations on appropriations; revolving fund.—

(3) Unless *approved* by the budget commission during each biennium as being justifiable and in the best interest of the state:

(d) No person employed by the state may hold more than one employment during his normal working hours with the state, such working hours to be determined by the head of the affected state agency.

(e) No person may receive compensation simultaneous from more than one appropriation from any moneys in the state treasury or other state moneys.

A similar situation was considered in AGO 054-248, 1953-54, p. 4. There the question raised was whether a member of the legislature may be employed in another state position. I made the following observations:

Although members of the legislature may not hold any other state office (§5, Art. III, State Const.) or federal office (§7, Art. III, State Const.) *these constitutional provisions do not prohibit a member of the legislature accepting state employment; for example attorney for the Racing Commission (State v. Futch, 122 Fla. 837, 165 So. 907).* We are inclined to the view that where a member of the legislature accepts employment with the state that he is within the purview of subsection (4) of §216.171, F. S., and for his own protection should obtain or have his employer obtain, the consent and approval required in said subsection.

I am advised that budget commission approval was secured for the payment of the compensation involved in the instant inquiry.

In the light of the foregoing comments your questions are answered as follows:

1. Chapter 63-300, places a maximum limitation of \$15,500 per annum on all sources of the salary of the budget director *for those duties performed as budget director*, but does not prohibit additional compensation for the performance of additional duties.

2. The budget commission does not have authority to approve a salary in excess of \$15,500 per annum for the budget director for duties performed as required by statute; however, this does not prevent the budget commission from approving the payment of compensation for additional duties performed in a different capacity as indicated above.

3. The budget commission *does* have the authority to approve the employment of the budget director in more than one capacity.

4. The budget commission *does* have the authority to approve the payment of a salary to the budget director from more than one source.

063-156—December 27, 1963

TAXATION

TAX EXEMPTION—PROFIT-SHARING TRUSTS FOR
BENEFIT OF PUBLIC EMPLOYEES—§1, ART. IX
AND §16, ART. XVI, STATE CONST.To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are profit-sharing trusts, set up by businesses for the benefit of their employees, for retirement and other benefits entitled to exemption from taxation?

Section 1, Art. IX, and §16, Art. XVI, of the State Const., limit tax exemption except where it is otherwise provided by the federal or state constitutional provisions, to properties held and used exclusively for "religious, scientific, municipal, educational, literary or charitable purposes." These constitutional provisions have been held to be limitations upon the power of the legislature to provide for the exemption from taxation of property, except those particularly mentioned classes specified in the organic law itself. (*L. Maxcy, Inc. v. Federal Land Bank*, 111 Fla. 116, 150 So. 248, text 250; *State v. St. John*, 143 Fla. 544, 197 So. 131, text 134; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304.)

In *Simpson v. Bohon*, 159 Fla. 280, 31 So. 2d 406, text 408, tax exemption was claimed for the clubhouse and building of the Elks Club, Inc., a nonprofit corporation, of Jacksonville, Florida. There was no argument as to the right of the portion of the property actually used by the club for its fraternal purposes to the exemption. The rents and profits of the portion of the building rented to others, comprising 43.1 per cent of the building, was used for building operation, maintenance and repairs, paying off of the mortgage incurred on the building, payment of taxes and as an investment for future purposes, concerning which use the court said that:

The stern fact is that not one dollar of this huge sum found its way into the charity fund. There is a vast and obvious difference in collecting money and paying it out in charities and that of creating a capital estate.

In *University Club v. Lanier*, 197 Fla. 146, 161 So. 78, text 79, the question of the exemption of the property of the University Club in Orange county, Florida, was brought into issue, the court stating:

It is the general rule that the exemption is determined by the use and ownership of the property and not altogether by the charter of the institution which owns and uses that property . . . The record shows that this property is used in part as a convenient place for members of the club to get meals, which are furnished at a price, and which they get just as they would such accommodations in any restaurant or dining room; that it is a place where members gather for relaxation and social intercourse; that these are really the outstanding features for which the clubhouse is used.

It appears from the opinion that the club may have made provision for one scholarship. It was held that the club property was not entitled to exemption.

These cases tend to show that "benevolent properties," in order to permit tax exemption of property, must be for benevolent purposes within the provision of §1, Art. IX, and §16, Art. XVI, of the State Const. We doubt that a profit-sharing plan for the benefit of the employees of an employer to provide retirement and other benefits for such members would be for a religious, scientific, municipal, educational, literary or charitable purpose within the constitutional provisions. The above question is answered in the negative.

063-157—December 27, 1963

TAXATION

SALES, USE AND ADMISSION TAXES, EXEMPTIONS—
SUMTER ALL-FLORIDA BREEDERS' SHOW AND
COUNTY FAIR ASSOCIATION, INC., WEBSTER
LIONS CLUB AND SUMTER COUNTY 4-H
COUNCIL—§§212.04, 212.08(8), 205.322,
616.12, 616.15; CHS. 212 AND 616, F. S.;
CHS. 63-247, 63-565, LAWS OF
FLORIDA

To: *Doyle Conner, Commissioner of Agriculture, Tallahassee*

QUESTIONS:

1. Does the admissions tax imposed by §212.04, F. S., as amended, apply to admissions or gate receipts to a rodeo performance operated by the Sumter All-Florida Breeders' Show & County Fair Association, Inc., an activity authorized in the articles of incorporation of said corporation?

2. Are food and drink sales by the Webster Lions Club and the Sumter County 4-H Council within the confines of the fairgrounds of the Sumter All-Florida Breeders' Show & County Fair Association, Inc., exempt from sales and use taxes under Ch. 212, F. S.?

Section 616.12, F. S., as amended by Ch. 63-247, which became a law on May 31, 1963, and became effective on July 1, 1963, provides:

Every person who may operate under any terms whatsoever, including lease arrangement, traveling shows, exhibitions, or amusement enterprises, carnivals, vaudeville, minstrels, *rodeos*, theatricals, games or tests of skill, riding devices, dramatic repertoires and all other shows or amusements including concessions operating in tents, enclosures or other temporary structures whether covered or uncovered, within the grounds of, and in connection with any fair held by a fair association incorporated under the provisions of this chapter (Chapter 616, Florida Statutes) shall pay the license taxes now or hereafter provided by law; provided, however, in event such association shall fully qualify with all other provisions of this act (Chapter 616, Florida Statutes) including securing the required fair permit from the commissioner of agriculture, then such traveling shows, exhibitions . . . including concessions operating in tents, enclosures or other temporary structures whether covered or uncovered, within the grounds

of, and in connection with any fair held by a fair association incorporated under the provisions of this chapter (Chapter 616, Florida Statutes) *shall not be required to pay any such license tax except as provided in section 205.322, Florida Statutes*, but shall operate under a tax exemption certificate which such fair association shall have first secured from the commissioner of agriculture the necessary permit required under section 616.15, Florida Statutes. (Emphasis supplied.)

The provision of §205.322, F. S., is more in the nature of a permit than a license tax although a fee of \$50 is required. The permit required under §616.15 is a permit from the department of agriculture for the operation of the fair. Said §616.12, F. S., seems to be more in the nature of an exemption from license taxes and not an exemption from excise taxes and the like.

It appears from your file handed us with your request for opinion that the rodeo and rodeo performance mentioned in the first above question is, and has heretofore been, operated as a part of the association's fair. Generally, admission charges are made by fair associations to finance the fair in whole or in part; here no admission is charged to the fair grounds, but in lieu thereof an admission charge is made to attend and view the rodeo, the proceeds of which are used to finance the fair operation in whole or in part in lieu of an admission charge to the fair grounds. There is little if any real distinction between financing a fair operation through admission charges to the fair grounds, and the financing of such fair operation from funds obtained from admission charges to the rodeo, operated as a part of the fair. There is little if any difference between the admission charges here made and those considered in our opinion 063-123, of October 18, 1963. *The first above question is therefore answered in the negative.*

Under sales and use tax rule 4A-1.05 (1) (g) general admissions to county and regional fairgrounds are exempt; under said rule 4A-1.05 (2) (h) "all general admission tickets to county and regional agricultural fairgrounds are exempt. The admissions to rides, attractions, shows and the like, for which a separate charge is made, are taxable." With regard to the sale of food and drinks by the Lions club and 4-H council mentioned in the second question, we find nothing in either Ch. 212 or 616, F. S., expressly exempting such sales of food and drinks. We specifically note the changes made in subsection (8) of §212.08, by Ch. 63-565, reducing the extent of the former exemption thereunder so that if subject to taxation under the statutes prior to said Ch. 63-565, such food and drinks would seem to continue to be subject to taxation.

The second question is, therefore, answered in the affirmative; that is, such sales of food and drinks are subject to the sales and use taxing statutes.

063-158—December 30, 1963

PUBLIC PURCHASING

BIDS ON STATE JOB NO. 09580-3603, HIGHLANDS COUNTY;
IRREGULARITY IN BIDS

To: John R. Phillips, Chairman, State Road Department,
Tallahassee

QUESTION:

Is the bid set forth in the following statement of facts irregular?

STATEMENT OF FACT:

Your question concerns a bid which under Item #480-2, shows a quantity of 35,890 square yards of grassing and mulching, and under the unit item there is written in words and in figures "thirty-five cents" and ".35" and under the amount item is found \$1256.15. You advise that under §2.7 and 3.1 of the standard specifications for road and bridge construction, the road department personnel, when checking the bid, multiplied the quantity by the unit price and found that the appropriate sum was \$12,561.50 instead of the quantity amount as stated in the bid of \$1256.15 and inserted the larger figure. You advise that if the larger figure is used this bidder's gross amount of the bid will be \$60,992.70 as opposed to the other low bids of \$60,962.07 and \$60,553.93, and therefore would not be low by some \$438.87. If the smaller figure is used, then this bidder would be approximately \$11,000 low in the amount of \$49,687.35.

As you have previously called to my attention, §2.7 and 3.1 of the standard specifications, provide as follows:

2.7 *Rejection of Irregular Proposals.*—Proposals will be considered irregular and will be rejected if they show omissions, alterations of form, additions not called for, conditional or unauthorized alternate bids, or irregularities of any kind; also if the unit prices are obviously unbalanced either in excess of or below the reasonable cost analysis values. (Emphasis supplied.)

3.1 *Consideration of Bids.*—For the purpose of award, after the proposals are opened and read, the correct summation of the products of the approximate quantities shown in the proposal by the unit bid prices will be considered in the bid. . .

In light of the above specifications, the price written in words under the unit column should be multiplied by the approximate quantity and this should be the controlling figure. Thus under the factual situation presented, the subject bid would be irregular and therefore disregarded and the contract awarded to the lowest regular bidder.

063-159—December 31, 1963

RETIREMENT

STATUS OF CIRCUIT JUDGES RETIRED UNDER CH. 123, F. S., PRIOR TO CREATION OF DIVISIONS B AND C PURSUANT TO CH. 63-462, LAWS OF FLORIDA—
 §§123.01, 123.02, 123.28, 123.26, 123.29, 123.39, 122.02, F. S.; §§2, 17, 19, ART. V, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May those circuit judges, who will have retired prior to the activation of divisions "A," "B" and "C" of the supreme court justices, district courts of appeal judges and circuit judges, as amended by Ch. 63-462, transfer to said division "B" and obtain social security coverage?

Said Ch. 63-462, makes provision for the establishment of divisions "A," "B" and "C" in the said supreme court justices, district courts of appeal judges and circuit judges retirement system, instead of the single retirement system existing at the time of the enactment and effective date of said Ch. 63-462, which became a law on June 18, 1963, and became effective on July 1, 1963, subject to the establishment of the said three divisions in the manner provided in said enactment.

If the said three divisions of the said retirement system are established and activated in accordance with said Ch. 63-462, division "A" will consist of those members of the retirement system existing prior to and at the time of the enactment and effective date of said Ch. 63-462, who do not elect to become members of division "B" of said retirement system as re-established by said Ch. 63-462; division "B" of said re-established retirement system will consist of those members of the existing retirement system who elect to become members of said division "B" prior to the execution of the agreement in pursuance of affirmative referendum as provided for in (amended) §123.26, F. S.; and division "C" is those justices and judges "who become members of the system on or after July 1, 1963." This would seem to be those justices and judges assuming office on or after July 1, 1963. Our question above posed appears to be applicable only to division "B" of the retirement system if and when adopted pursuant to the provisions of said Ch. 63-462.

Section 2, Art. V, of the State Const., provides in part that "any retired justice or judge may, with his consent, be likewise assigned to judicial service." Section 17 of said Art. V, provides that "all justices and judges shall automatically retire at age seventy." Section 19 of said Art. V, provides that "a retired justice or judge assigned to active judicial service shall, while so serving, receive as additional compensation the difference between his retirement benefits and the compensation applicable to such service." These constitutional provisions clearly demonstrate that a retired supreme court justice, district court of appeal judge or circuit judge does not entirely cease to be a judicial officer of the state, but continues, when assigned to judicial service under §2, Art. V, of the State Const., to be vested with judicial power at least to the extent necessary to carry out his judicial assignments under said §2, Art. V, of the State Const.

Section 123.29, F. S., as amended, makes reference to "benefits payable to *members or for the account of members of the system*," that is, the retirement system provided by Ch. 123, F. S. In *Denby v. Berry*, 263 U. S. 29, 44 S. Ct. 74, text 76, 68 L. ed. 148, text 151, the supreme court of the U. S. held that a member of the U. S. navy, detached from active duty and told to consider himself honorably discharged from active service, was removed from active duty to a *retired status but not separated* from the navy. In *Booth v. United States*, 291 U. S. 339, 54 S. Ct. 379, 78 L. ed. 836, the U. S. supreme court held that where a federal judge retires under the statutes permitting him, with his consent, to be assigned to judicial service, he is not separated from office but continues in office on a retired status, but does not cease to be a judicial officer. He assumes a retired status from his office and the retirement system, remaining a member of the system to a limited extent, including his right to draw his retirement compensation. Prior to the adoption of former §49, Art. V, of the State Const., provided for the resignation of supreme court justices and circuit judges with continuous service of a given number of years; and said §49 provided for retirement, instead of such resignation, in which case they were qualified, with their consent, to perform further judicial services upon assignment as therein provided. As to justices and judges who resigned with pay prior to the adoption of said §49, it was provided that "any justice or judge who may have resigned before this amendment becomes operative, may come within its terms by filing a certificate of his willingness to do so with the Clerk of the Supreme Court." Some retired judges, including at least one resigned supreme court justice, filed such a certificate and rendered additional judicial service upon assignment by the chief justice of said Court.

Sections 123.02, 123.28 and 123.39, F. S., require that active members of each of the three divisions of membership in the said retirement system contribute to the retirement system eight per cent of his total salary as such judge, such salary as of this time, and for many years last past being provided by statute on an annual basis of a fixed salary. Although not binding under Ch. 123, F. S., §122.02(3), F. S., relating to the state and county officers and employees retirement system, defines "salary," as used in said chapter, as "the fixed monthly compensation paid officers and employees . . ." A salary is usually understood to mean a fixed periodical compensation paid for services rendered, or recompense paid at regular intervals. (Webster's Dictionary; Black's Law Dictionary; Words and Phrases; Bouvier's Law Dictionary; 43 Am. Jur. 147, §357; 77 C. J. S. 553-558). We doubt that the compensation paid retired justices and judges, that is, the "difference between his retirement benefits and the compensation" paid active justices and judges, may be taken and deemed to be "salary" upon which additional contributions may be made or required after the justice or judge has retired under Ch. 123, F. S. This because such compensation is not paid at fixed periods of time as a salary is paid, but is paid at irregular intervals, depending on when the additional compensation is paid.

The fact that such compensation is not salary within the provisions of Ch. 123, F. S., does not mean that it will not be salary within the federal social security statutes, where the justice or judge in question is a member of the social security system. Where a retired justice or judge is under social security, whether or not

he will be required to pay social security on the additional amounts earned by him under §19, Art. V, of the State Const., depends upon the federal social security laws, and, if required, it may be withheld from his additional compensation. If such payments are to be required, then we must presume that the Florida legislature, when it amended Ch. 123, F. S., intended to include therein such authority for the making of such additional payments as may be required by the federal social security laws. We do not think that there would be any contributions to the Florida justices and judges retirement system based on this additional compensation after a justice or judge has retired under Ch. 123, F. S. However, this would not prevent the withholding and paying over of social security taxes on the same if due and payable under the federal statutes and laws.

We find nothing in Ch. 123, F. S., as amended by Ch. 63-462, which would prevent a retired justice or judge, who had retired prior to the effective date of said Ch. 63-462, or the activating of retirement divisions "B" and "C" as authorized by said Ch. 63-462, from transferring to said division "B" and seeking any social security coverage which he might be entitled to under federal social security statutes and laws. Although justices and judges retired under Ch. 123, F. S., may not be said to be on a salary, as are active justices and judges, they are nevertheless justices and judges holding office on a retired status, subject to being assigned to judicial service by the chief justice of the supreme court of Florida, or in his absence or inability, by the acting chief justice of said court. By retiring pursuant to the constitution and the statutes of Florida, a justice or judge does not relinquish his office; he merely retires from active judicial service. Borrowing from the opinion in *Booth v. United States*, supra, "the purpose is, however, that he shall continue, so far as his age and his health permit, to perform judicial service, and it is common knowledge that retired judges have, in fact, discharged a large measure of the duties which would be incumbent on them, if still in regular active service. It is scarcely necessary to say that a retired judge's judicial acts would be illegal unless he who performed them held the office of judge." This is undoubtedly the rule in Florida.

The retired justice or judge draws his retirement pay whether he performs any judicial services or not, and draws additional compensation under §19, Art. V, of the State Const., only when performing judicial services under an assignment by the chief justice, or acting chief justice, of the supreme court of Florida. Whether a retired judge or justice transferring to division "B" of the retirement system under Ch. 123, F. S., may obtain social security coverage or not will largely depend upon whether he may obtain service credit sufficient for that purpose under and pursuant to the federal social security statutes and laws. The Florida statutes merely and only permit the justice or judge transferring to division "B" to obtain social security coverage when entitled thereto under and pursuant to the federal statutes and laws and the agreement between the state of Florida and the federal government.

The above stated question is answered in the affirmative, provided such retired justice or judge may be entitled to social security coverage under federal statutes and laws and the contract between the state of Florida and the federal government.

063-160—December 31, 1963

PUBLIC RETIREMENT SYSTEMS

TAX SHELTERED ANNUITIES—DEDUCTIONS FOR— RETIREMENT PAY—§231.37, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a public agency, officer or body, whose officers or employees are members of a public retirement system, purchases out of its own funds a tax sheltered annuity for such officers or employees, reducing the compensation of such officer or employee in the amount of the cost of such annuity, should the cost of such annuity be added to the compensation actually paid to such officers and employees to determine retirement pay?

The letter of Oct. 29, 1963, from Robert A. Ware, Jr., attorney for the Dade county public schools, to William H. Corbett, of your office, appearing in your file handed us with the request for opinion states in part that:

The plan which we will submit to the board of public instruction for its approval is to offer all employees the opportunity to sign a contract with the board that they will take a reduction in their present salaries on a percentage basis, which will be not less than 5% nor more than 16%, the individual employee having the right to select the percentage reduction which he wishes.

This is in no way to be construed as a deduction withheld by the school board from its employees, but is to be considered a bona fide reduction in their basic salaries in compliance with the letter and spirit of the internal revenue code.

The contract with the employee, however, will state that the school board shall use the amount that the employee's salary is reduced to purchase for the employee an annuity. In this manner the school board will sign the application for the annuity and will pay money direct to the insurance company issuing the annuity. This must be done so that it will be clear that the funds used to purchase the annuity are the board's funds and not the funds of the employee.

After this plan is effected, the employee will gain a tax advantage by paying income tax on his new reduced salary amount so that the payroll department in making the employee's check will base his withholding tax on this new reduced salary. It is the opinion of this office that social security payments, where applicable, should also be computed by the payroll department on the new reduced salary.

Our office is inclined to feel that the state and county retirement deductions should also be figured on the new reduced salary in keeping with the overall intent of this plan that the employees are actually earning a lower gross income (new reduced salary).

According to the facts set forth in the letter of explanation of the plan from Mr. Robert A. Ware, Jr., the school employee can elect to receive the funds involved either as salary or to have them allocated to the purchase of an annuity for his benefit to be received at some later date.

Section 231.37, F. S., provides:

Salary.—Any person employed in an instructional capacity shall receive the salary prescribed by the salary schedule adopted by the county board in compliance with the requirements of chapter 230.

It seems clear from the above that teachers' salaries are fixed by law according to "the salary schedule adopted by the county board. . . ." All teachers in a given county receive the same salary fixed by the board according to their classification determined by certificate rank and other qualifications.

The fact that a teacher might voluntarily sign an agreement to have his salary "reduced" on condition that the funds withheld are used to purchase for him an annuity would not affect the amount of his salary in determining the amount required to be paid into the teacher retirement fund.

This opinion is in accord with prior opinions on the same question by the attorney general of Illinois (Oct. 4, 1960) and the attorney general of Alabama (Feb. 15, 1962).

The question of the acceptability of this or any specific plan for the allocation of funds by a county school board for "tax sheltered annuities" is one which must necessarily be determined by the federal internal service.

Your question is therefore answered in the affirmative.

064-1—January 3, 1964

COUNTY SCHOOL PERSONNEL

TEACHERS' COMPETENCE AWARDS—FUNDS AUTHORIZED FOR PAYMENT—§236.021, F. S.; CHS. 63-300, 63-463, 61-263, LAWS OF FLORIDA; §30, ART. III, STATE CONST.

To: *Thomas D. Bailey, Superintendent of Public Instruction, Tallahassee*

QUESTION:

Are state funds for payment of the total number of teachers' competence awards for the 1963-64 school fiscal year limited to the amount appropriated therefor in Item 458 of the 1963 general appropriation act?

You stated that there are 8,745 teachers certified as eligible to receive the \$400 competence award under §236.021(4) F. S., 1961, for the 1963-64 school fiscal year pursuant to §236.021, F. S., 1963, and that the appropriation of \$2,800,000 by Chapter 63-300, Item 458, for this purpose will only finance 7,000 of such awards leaving a deficit of \$698,000 needed to finance the remaining 1,745 awards.

Section 1 of Ch. 63-463, repealed §236.021, F. S., 1961, with the following proviso:

Section 1. Section 236.021, Florida Statutes, is hereby repealed, provided, however, that teachers who have qualified in the 1962-63 school fiscal year under the provisions of this law for competence awards payable in the

1963-64 school fiscal year and who continue teaching service in the public school system of the county *shall receive such awards.* (Emphasis supplied.)

The underscored language shows the intent of the legislature to be that teachers who qualified in the 1962-63 school fiscal year under §236.021, F. S., 1961, are to receive competence awards payable in the 1963-64 school fiscal year if said teachers continued teaching in the public school system of the county. The words, "shall receive such awards" make the payment of said awards mandatory. Both Ch. 63-463 and the appropriation act, Ch. 63-300, became law on July 1, 1963. On the one hand the legislature mandatorily provides that the competence awards for the 1963-64 school fiscal year are to be received by eligible teachers and on the other hand the legislature did not appropriate a sufficient amount of funds to pay these awards in Item 458 of the appropriation act, said item being designated specifically for that purpose. However, in Items 449, 449a and 450 of the same appropriation act the legislature provided funds for the minimum foundation program.

Section 236.021, F. S., was originally enacted to recognize the competence of teachers by awarding them funds in addition to all other salary allotments and requirements. Said §236.021(2), F. S., 1961, provides:

(2) These awards *shall be payable entirely from state funds and shall be in addition to all other salary allotments and requirements;* and nothing in this section shall be construed as prohibiting or discouraging any county from paying other increments from funds or from maintaining a sound salary schedule. (Emphasis supplied.)

Subsection (4) of §236.021, F. S., provides:

(4) Each person on the instructional staff who meets the requirements of Subsection (3) and who is so evaluated in the year preceding award that he ranks among the highest thirty per cent of all the teachers in his county in the year in which the awards are made *shall be paid a competence award of four hundred dollars* if he continues his teaching service in the public school system of the county. (Emphasis supplied.)

It is clear from the above that the awards are to be paid entirely from state funds (see AGO 062-5, biennial report, 1961-62). It is equally clear that a definite amount is designated of \$400 for each award, the total sum being easily ascertained by multiplying \$400 times the number of teachers entitled to the award.

Since the appropriation in Ch. 63-300 for teachers' compensation awards and Ch. 63-463 deal with the same subject, they are in *pari materia*. The rule that statutes in *pari materia* should be construed together, applies with peculiar force to statutes passed at the same session of the legislature and such statutes should, if possible, be construed so as to harmonize and give effect to the provisions of each. *Ex parte Perry* 71 So. 174, *State v. Johnson*, 72 So. 477.

As stated previously, the mandatory language of the legislature in Ch. 63-463 showed its clear intent that the competence awards be provided for teachers who qualify under §236.021, F. S., 1961 and 1963. Considering the fact that the legislature could not have known at the time the item appropriation was made how many teachers would be eligible for the award in the 1963-64 school fiscal year the item of \$2,800,000 in the general appropria-

tion act was an underestimate of the amount necessary. However, the predominant legislative intent clearly appears by reference to said Ch. 61-263 and 63-463 to the effect that all teachers eligible for competence awards should each receive \$400 out of state funds.

Chapter 63-463, now §236.021, F. S., 1963, when read in connection with the parent act, Ch. 61-263, is in and of itself an appropriation to pay from state funds a sufficient amount to cover all competence awards made in the 1963-64 school fiscal year. Such a construction of said chapter completely fulfills the manifest intent of the legislature particularly in view of the cases of *State v. Southern Land and Timber Co.*, 33 So. 999, and *Amos v. Moseley*, 74 Fla. 555, 77 So. 619. Said cases and later cases following the rules enunciated therein hold that separate legislative appropriation acts often control over the general appropriation act (§30, Art. III, State Const.), and that it is not required that the general appropriation act embrace all legislative appropriations. An underestimate in the general appropriation act of the amount necessary to carry out a state purpose is clarified and corrected where a companion act by apt language spells out and appropriates the full amount required.

It is true Ch. 63-463 repealed Ch. 61-263, but the former in express terms required payment of the competence awards made in the school year 1963-64 pursuant to the provisions of the parent act, 61-263. Furthermore, the 2 cases last referred to indicate an appropriation, often indefinite in amount, continuing in nature and subject to the needs and changes of further years, may be couched in general terms in a statute rather than as a specific monetary item in an appropriation act.

As previously shown the parent act, Ch. 61-263, provided that the competence awards would each be in the sum of \$400 and that they "shall be payable entirely from state funds." The repealer, Ch. 63-463, carried this same language forward by reference in order that competence awards be paid 1 more year but no longer by providing, "that teachers who qualified in the 1962-63 school fiscal year under the provisions of this law" shall be paid said awards. Thus, the statutory authority is complete in itself and as pointed out previously the amount is a matter of clear ascertainment as to the number of teachers receiving the awards because it is subject to an exact mathematical computation. (Emphasis supplied.)

As a further basis for the use of additional state funds to pay these awards we may again look to the 1963 appropriation act, Ch. 63-300. It was pointed out previously that Items 449, 449a and 450 in said act provided funds for the minimum foundation program. Section 236.021 providing for the competence awards is couched right in the middle of the chapter creating and providing for the minimum foundation program. Indeed, said section follows §236.02, F. S., which sets forth the requirements for participation in the foundation program fund. It appears to be the clear intent of the legislature that the competence awards are a factor in the minimum foundation program. As such, state funds must be used to guarantee payment of said awards for whatever amount the state is responsible for as stated in §236.021(2), F. S., 1961, quoted herein. You stated that there are funds available in the minimum foundation program which will be more than enough to cover the \$698,000 deficit in regard to the competence awards. Under the

foregoing, said funds may be used to pay this deficit.

Your question is answered in the negative and the state funds available to pay the competence awards for the 1963-64 school fiscal year are not limited to those funds appropriated in Item 458 of the 1963 appropriation act.

064-2—January 14, 1964

STATE OFFICERS AND EMPLOYEES

AMENDMENT OF §112.061, F. S.—PER DIEM—CHS. 63-5, 63-122, 63-192, 63-400, LAWS OF FLORIDA

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where the travel of a state officer is confined to 1 day or less, how should the per diem of such officer be calculated?

An examination of the session laws enacted at the 1963 regular session of the Florida legislature, reveals that §112.061, F. S., relating to mileage, per diem and other travel expenses of state officers and employees, was amended, in whole or in part, by Ch. 63-5, which amended subsection (1) of the said section; by Ch. 63-122, which amended subsection (5) of said section; by Ch. 63-192, which amended subsection (1) of said section by adding a paragraph thereto designated as paragraph (a) thereof, and by Ch. 63-400, which appears to have been a complete revision of the said section. Chapter 63-5 became a law and became effective April 24, 1963; Ch. 63-122 became a law and became effective around May 21, 1963; Ch. 63-192 became a law and became effective around May 28, 1963; and Ch. 63-400 became a law around June 12, 1963, and became effective on July 1, 1963.

Chapter 63-5 amended subsection (1) of §112.061, F. S., "to read" as set out in the amendment; likewise, Ch. 63-122 amended subsection (5) of said §112.061, "to read" as therein set out; Ch. 63-192 amended said section "by adding paragraph (a) to read," as therein set out; Chapter 63-400 provides that "section 112.061, Florida Statutes, is amended to read:" as set out in the said act.

In *Singleton v. Larson*, Fla., 46 So. 2d 186, text 190, the supreme court of Florida said that: "We have held that where there is an amendment to a section of a statute, the amendatory section takes the place of the section amended as a part of the original act." *Stokes v. Galloway*, 61 Fla. 437, 54 So. 799. "When a section is amended by an enactment by stating it 'shall read as follows', the desired amendment then follows, the substituted amendment becomes for all purposes in the future the section of the original act. *Miami Bridge Company v. Railroad Commission*, 155 Fla. 366, 20 So. 2d 356." In the latter case above cited the court, text 359 said that: "When a section is amended by an enactment by stating it 'shall read as follows'; the amendment desired then follows, then the substituted amendment becomes for all purposes in the future the section of the original act." See also *Jacksonville, Tampa & Key West Railway Co. v. Adams*, 33 Fla. 608, 15 So. 257, text 258; *Basnett v. Jacksonville*, 19 Fla. 664, text 667; 30 Fla. Jur. 237 and 238, §135; 82 C. J. S. 903 and 904, §384.

A reading of Ch. 63-400, relating to the traveling expenses of

all public officers, employees and authorized persons, as defined therein, taking into consideration the number of other sections of the statutes and laws amended, altered or changed by §§2-18 thereof, the language of the title to the said act and the preamble thereto, clearly indicates a clear intent on the part of the 1963 legislature to revise and restate the general statutes and laws relating to traveling expenses, per diem, etc., of public officers and employees in this state. Such a revision repeals existing statutes and laws within the scope of such revision, whether there be an express repeal of such existing statutes or not. (*Brevard County v. Bd. of Pub. Instr.*, Fla., 33 So. 2d 54, text 55; *Realty Bond and Share Co. v. Engler*, 104 Fla. 329, 143 So. 152, text 155; *State v. Stoutamire*, 98 Fla. 486, 123 So. 834, text 836; *State v. Rose*, 97 Fla. 710, 122 So. 225, text 230).

In the light of the above and foregoing, §112.061, F. S., as amended by Ch. 63-400, replaced and repealed by implication the original §112.061, F. S., and the amendments made by Ch. 63-5, 63-122, and 63-192, so that travel, per diem, and other refundable expenses, are governed by said §112.061, F. S., as amended by Ch. 63-400. Therefore, the travel expense, including mileage, per diem and other refundable expenses of state officers and employees, except where otherwise expressly or impliedly exempted from the operation of said §112.061, F. S., as amended by Ch. 63-400, whether for more than 1 day, 1 day, or less than 1 day, is governed and controlled by said §112.061, as amended as aforesaid.

064-3—January 15, 1964

ELECTIONS AND ELECTORS

CHAPTER 104, F. S.; CORRUPT PRACTICE ACTS—APPLICABILITY TO MUNICIPAL ELECTION—§26, ART. III, STATE CONST.

To: *James R. Dillard, County Prosecuting Attorney, Clearwater*
QUESTION:

Are the provisions of Ch. 104, F. S., commonly known as the corrupt practice acts, applicable to the prohibited corrupt acts and deeds described in said chapter when they occur in connection with a municipal election?

At the outset, it is perhaps appropriate to review the history, background and purpose of the corrupt practice acts. Section 26 of Art. III of the State Const. provides:

Laws shall be passed regulating elections, and prohibiting under adequate penalties, all undue influence thereon from power, bribery, tumult or other improper practice.

Pursuant to such constitutional amendment, the legislature enacted Ch. 6470, 1913, commonly known as the Trammell Corrupt Practices Act. This act was carried into the Florida Statutes as Ch. 875 until 1951 at which time the legislature enacted the election code of 1951 by Chapter 26870, 1951. The latter act, of course, included the corrupt practices provisions contained in Ch. 875 to be thenceforth carried in Ch. 104, F. S.

In speaking of a provision of this chapter, §104.34, relating to the publication of charges against the candidate unless such charges be personally served upon the candidate at least 18 days prior to the day of election, the Fla. supreme court in *Ex Parte*

Hawthorne, 156 So. 619, construed the said section as "... an effort on the part of the Legislature to exercise its police power to promote fair play and fair competition in politics by denouncing as an 'improper practice' the unannounced publication and circulation of tangible forms of charges and attacks upon a candidate of a kind designed and intended to be passed from hand to hand as hostile influences against him, without an opportunity being afforded to defend against such charges or attacks by the same means that were employed by the attacker; ..."

These specific provisions about which you inquire, that is §104.37, contain prohibitions of similar import. Other provisions of Ch. 104 relate to fraud in connection with casting votes, corruptly influencing votes, false swearing, threats of employer to control votes of employees, intermingling of ballots, voting in person after casting absentee ballots, casting more than one vote at any election, stealing and destroying records of elections, making false, willful or malicious charges against opposing candidates, etc. Examination of such provisions in toto made it quite clear that the legislature intended to maintain the purity of elections. Elections, be they of officers on the federal, state, county or municipal level, are at the heart of a free democracy. Without purity in the election process, our entire system of government will decay. That the prohibitions against corrupt practices contained in Ch. 104, F. S., are applicable to municipal elections seems without doubt, for corruption is no less iniquitous when occurring in a municipal election than in a state or county election.

In reviewing the provisions of various sections of Ch. 104, relating to corrupt practices, we note no words of limitation whereunder the prohibitions could be said to be limited to state or county elections. Section 104.011, relating to false swearing or procurement thereof, uses general language connecting such practices with "... voting, registration or elections. ..." Section 104.031, relating to making false declarations and assistance in the preparation of a ballot, uses the general wording "... in any election. ..." Section 104.041, relating to fraud in connection with casting votes, uses the language "... fraud in connection with any vote. ..." Section 104.061(2), relating to corruptly influencing voting, uses the language "No person in the furtherance of or in opposition to the candidacy of any person for nomination or election in any election shall give or promise. ..." Section 104.15, relating to unqualified persons voting, uses the language "... wilfully votes at any election. ..."

The above are only a few of the examples showing that the legislature in choosing the language prohibiting the corrupt practices described in the various sections of Ch. 104 used language reflecting an intent that the corrupt practices proscribed against were not to occur *in any election*. This conclusion finds ample support in *Ex Parte Senior*, 19 So. 652, as well as other cases cited herein.

The provision presently contained in §104.39, F. S., granting immunity to witnesses as to violations of the corrupt practice acts, has been held to obtain as to witnesses testifying with respect to corrupt practices proscribed by the subject chapter occurring during the course of a municipal election. See *State ex rel Marshall v. Petteway*, 164 So. 872; *State ex rel Truesdell v. Petteway*, 164 So. 874; *State ex rel Diaz v. Petteway*, 164 So. 874; *State ex rel Lemus v. Petteway*, 164 So. 875.

To hold that the above enumerated corrupt practices are prohibited only in state or county elections would of necessity lead to the conclusion that the legislature considered such acts permissible in municipal elections. It goes without saying that to so hold approaches the unthinkable.

Our attention is directed to the provisions of §104.45, F. S., which provides that upon presentation of a petition signed by 25 qualified electors in a municipality, a municipality may upon official approval by the governing authority under the charter adopt the state election laws for conducting a municipal election. That a municipality has not formally adopted the state election laws for conducting a municipal election, as provided in §104.45, does not lead us to perceive collision with the applicability of the corrupt practices provisions in Ch. 104 to municipal elections. The reference found in the statute to such adoption can only affect the "procedural" aspects of conducting a municipal election. Indeed, in some of our sister states wherein the question has arisen concerning the applicability of state corrupt practice acts, it has been held that where the state act contained a procedural requirement such as the filing of certain reports within a given time, such provisions would not be applicable to a municipal election. Where, however, the specific provision sought to be made applicable to a municipal election involved deeds and acts which were inherently corrupt and of the kind which interfered with the purity of elections, then in such instances the courts have held that they applied to municipal elections. See *Dickenson v. Nelson*, 272 NW 297, and *Doughty v. Bryant*, 145 So. 420 (Ala.).

As reasoned above, while I do not believe that a municipality may deprive its citizens of the protection afforded by the corrupt practice acts by failing, neglecting or otherwise omitting to follow the procedure outlined in §104.45, F. S., it is nonetheless interesting to observe that the charter of the town of Belleair Beach, approved by the voters of that municipality on Feb. 10, 1959, and filed in the office of the secretary of state in municipal charters book IV, pp. 184-245, provides in Art. XVIII, p. 46, the following:

All such elections shall be conducted substantially on the principle adopted for the state elections, insofar as there is no conflict with the terms of this Charter; . . .

In view of the foregoing reasoning and authorities, the question is answered in the affirmative.

064-5—January 16, 1964

TAXATION

HOMESTEAD TAX EXEMPTION—HUSBAND AND WIFE CLAIMING SEPARATE EXEMPTIONS—§7, ART. X, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May a husband and wife, owning separate dwelling houses within the state or a county, residing together in each such dwelling at intervals, each claim tax exemption upon said dwelling owned by them?

It appears from the information before us that the dwelling owned by the wife and the dwelling owned by the husband are fully furnished and capable of being used as dwelling houses, with the

couple residing in the dwelling of the wife part of the time and in the dwelling of the husband the balance of the time. However, the husband is registered as a voter in the voting precinct in which his dwelling is located, and the wife in the voting precinct in which her dwelling is located. Neither of the two mentioned dwellings is ever rented to other persons. For the purposes of this opinion we will presume that the wife resides in her dwelling, the husband residing in his dwelling, each alone, during periods of time, while at other periods of time they reside together in the husband's dwelling, and at still other periods of time they reside together in the wife's dwelling.

Section 7, Art. X, of the State Const., makes provision for homestead exemption from taxation in this state, providing in part that:

Every person who has the legal title or beneficial title in equity to real property in this state and *who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon said person*, shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of five thousand dollars on said home and contiguous property . . ." (Emphasis supplied.)

For one to be entitled to homestead tax exemption he or she must have and maintain a *permanent home* within the state. It is stated in *Re. Gilbert's Estate*, 311 Ill. App. 28, 35 N. E. 2d 400, text 404, that a permanent abode is necessary to constitute a residence. "Residence" and "permanent abode" are synonymous terms. One cannot have a residence in two places at the same time. In *Park v. Hood*, 374 Ill. 36, 27 N. E. 2d 838, text 842, it was stated that a permanent abode is necessary to constitute a residence. In *Hoffman v. Illinois Terminal RR Co.*, Mo. App., 274 S. W. 2d 591, text 593, it was said that "permanent" refers to a thing which will continue regardless of contingencies or fortuitous circumstances. In *Brown v. Hodges*, 233 N. C. 617, 65 S. E. 2d 144, text 147, the word "permanent" is defined as continuing or enduring in the same state, status, place or the like, without fundamental or marked change.

In *Schooley v. Judd*, Fla. App., 149 So. 2d 588, a husband residing in and domiciled in Lee county, conveyed his dwelling house in said county to his wife, in which he and his wife resided at the time of the conveyance, who continued to reside therein, and moved his domicile and place of residence to Washington, District of Columbia, although he appears to have spent considerable time with his said wife in the dwelling conveyed to her as above-mentioned. The district court of appeal, 2nd district of Florida, held that the domicile and residence of the wife followed that of her husband so that she was a resident of and domiciled in the District of Columbia, and not entitled to homestead tax exemption on the dwelling conveyed to her by her husband as aforesaid, although she continued to live in the house conveyed to her by her husband in Lee county, and not in the District of Columbia with her husband. In other words, the district court of appeal held in effect that a wife cannot legally establish a Florida residence, when her husband is domiciled in another state, territory or district of the U. S., so long as they maintain a congenial marital relationship. The supreme court, on appeal from the district court of appeal (opinion filed Dec. 13, 1963, but not yet published in the Southern

Reporter), rejected the strict theory of the common law that the domicile and residence of the wife follows that of her husband in all cases, absent grounds for divorce or legal separation, and held that under the circumstances homestead tax exemption should have been granted the wife.

Although the supreme court of Florida, in *Judd v. Schooley* (not yet reported), held that a homestead tax exemption may be granted to a wife residing in this state, when her husband was domiciled in and resided in another state, district or territory of the U. S., where there are no grounds which would justify divorce or legal separation, such holding is not necessarily applicable where both the husband and the wife reside, under like circumstances, in the same county of the state of Florida, or even in 2 separate counties of the state. In *Judd v. Schooley* there appears a reasonable reason and excuse for the separate residences and domiciles, even impelling reasons for such separate residences and domiciles. In the case before us we find no such impelling reasons for separate residences and domiciles. We do not think that it was ever the purpose and intention of §7, Art. X, of the State Const. that both a husband and wife maintaining a congenial marital relationship within the state of Florida, there being no sufficient grounds for divorce or legal separation, be both granted homestead tax exemption on dwelling houses maintained by each of them merely because they spend a large part of the time in their said separate dwelling houses. Section 7, Art. X, of the State Const. was designed as a protection for a family, whether it consists of a single person or 2 or more persons, and not as a means or device of tax evasion.

Under the facts and circumstances surrounding the question herein considered we are of the opinion that the said question should be and it is hereby, answered in the negative.

064-6—January 16, 1964

TAXATION

INDUSTRIAL DEVELOPMENT CORPORATIONS—TAX EXEMPTION STATUS—§§289.181, 192.54, 201.10, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What are the tax exemption rights of industrial development corporations, organized and incorporated under and pursuant to Ch. 289, F. S.?

Section 289.181, F. S., provides that, "any tax exemptions, tax credits, or tax privileges granted to banks, savings and loan associations, trust companies, and other financial institutions by sections 192.54 and 201.10, or by any other general laws, are granted to corporations organized pursuant to this act." Section 192.54, F. S., provides that: "all banks, trust companies and Morris Plan banks, now or hereafter chartered under the laws of the state, shall have the same immunity from state and local taxation that national banking associations have from time to time under the statutes of the United States." Section 201.10, F. S., provides that: "all certificates of deposit issued by any bank, banking association, or trust company are exempt from the requirement for an excise tax imposed by this chapter." Exemption of national banking institutions from state taxation is largely determined by §548, title 12, of the U. S. code, to which reference is made.

Under said §548, title 12, "the legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax said associations on their net income, or (4) according to or measured by their net income," such assessments to be made subject to the conditions mentioned in the said section. Florida having no income tax provisions, (2) and (3) would not seem to be applicable in this state. It is provided in and by subsection 3 of the said section that nothing therein "shall be construed to exempt the real property of (national banking) associations from taxation in any state or in any subdivision thereof, to the extent, according to its value, as other real property is taxed." The omission of congressional authority to tax the personal property of national banking institutions, specific authority being necessary for state taxation, has the effect of exempting such property from state and local taxation. (*Roberts v. Amer. Nat'l Bank*, 97 Fla. 411, 121 So. 554; 30 Fla. Jur. 546, §117; 31 Am. Jur. 311, §254, note 17; 84 C. J. S. 295, §150, note 22). It has also been held that in the absence of congressional consent, state license, privilege, occupation, sales, use or other excise taxes may not be imposed on a national bank. (53 C. J. S. 557, §29, note 80). The tax exemption under §192.54, F. S., is measured by said §548, title 12, of the U. S. code, as above discussed.

Section 201.10, F. S., referred to in said §289.181, F. S., exempts only "certificates of deposit" from taxation under Ch. 201.10, F. S., relating to documentary stamp taxes. This would seem to exempt from the documentary stamp taxing laws of this state certificates of deposit issued by the industrial development corporations.

The tax exemption rights of industrial development corporations are, under and pursuant to §289.181, F. S., which refers to §§192.54 and 201.10, F. S., the same as the exemption rights of national banking associations under §548, title 12, of the U. S. code, above referred to and quoted from, and of banks generally to exemption under §201.10, F. S., as to certificates of deposit issued by them, if any. In that promissory notes owned and held by national banking associations are not subject to state intangible personal property taxation, promissory notes held by industrial development corporations would, under the terms of said §§192.54 and 289.181, F. S., be entitled to exemption from intangible personal property taxes. This opinion is confined to the statutory provisions above-mentioned, and tax exemptions therein provided.

064-7—January 16, 1964

TAXATION

IMPROPER CLASSIFICATION OF PROPERTY FOR PURPOSES OF AD VALOREM TAXES—REFUNDS— §§192.21, 193.11, 193.201, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

When real estate used as agricultural lands was assessed generally for the tax year of 1962, and the

taxes paid on said classification, but was classified as agricultural lands for the tax year of 1963, as provided by §193.201, F. S., on a lower valuation, would the taxpayer be entitled to a refund of taxes paid for 1962?

We must presume that the taxes imposed for the tax year of 1962 were imposed upon the valuations made by the county assessor of taxes, which assessments are presumed to have been equalized and approved by the board of county commissioners, and that the taxes in question were imposed upon these valuations and assessments. When these taxes were so assessed and the tax roll was delivered to the county tax collector such assessments were brought within the purview of the provision in §192.21, F. S., that, "no assessment shall be held invalid unless suit be instituted within sixty days from the time the assessment shall become final." The 1962 tax assessments became final when the tax roll for that year was delivered to the county tax collector in accordance with the applicable statutes (*Rudisill v. City of Tampa*, 151 Fla. 284, 9 So. 2d 380; *Overstreet v. Frederick B. Cooper Co.*, Fla. App., 114 So. 2d 333, text 334; *Dade County v. duPont Plaza, Inc.*, Fla. App. 117 So. 2d 849, text 850 and 851, 125 So. 2d 564).

The fact that a taxpayer paid his 1962 taxes under protest as being violative of §193.11(3), F. S., will not entitle him to a refund of said taxes, in whole or in part, unless the requirements of said §192.21, F. S., requiring the filing of a suit contesting the validity of the tax within 60 days after the tax roll became final, were complied with.

The above stated question is answered in the negative, absent a decree of a court of competent jurisdiction holding the assessment invalid.

064-8—January 16, 1964

TAXATION

MOTOR VEHICLES—MOTORIZED CARTS—TAX EXEMPTION AND LICENSE TAXES—§13, ART. IX, STATE CONST.—CHS. 7275, 1917; 6880, 1915; 6212, 1911; 5437, 1905, LAWS OF FLORIDA; CHS. 317 AND 320, 200, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are motorized carts, either gasoline or electric powered, such as those used as shopping vehicles and golf carts, motor vehicles within the purview of §13, Art. IX, of the State Const.?

Under said §13, Art. IX, of the State Const., "Motor Vehicles, as property, shall be subject to only one form of taxation which shall be a license tax for the operation of such motor vehicles . . ." Said §13, Art. IX, of the said Const. was adopted at the general election in 1930, at which time §1006, Revised General Statutes, 1920, as amended by §1, Ch. 10182, 1925, provided that, for the purpose of motor vehicle licenses and license taxes, the term "motor vehicle" included: "motorcycles, automobiles, motor trucks, and all other vehicles operated over the public streets and highways of

this state, propelled by power other than muscular power, except traction engines, road rollers and such vehicles as run only upon a track."

This definition of a motor vehicle appears to have originated as a part of §1, Ch. 7275, 1917. Previous motor vehicle licensing laws referred to, "... every automobile and other motor driven vehicle operating in this state ..." (Section 1, Ch. 6880, 1915; Section 1, Ch. 6212, 1911). See also §1, Ch. 5437, 1905, regulating the use of, "... vehicles propelled by any power other than muscular power, excepting such motor vehicles as run only upon rails or tracks ..." For the purposes of motor vehicle licenses and license taxes, "motor vehicles" are defined as including, "automobiles, motorcycles, motor trucks and all other vehicles operated over the public highways and streets of this state and propelled by power other than muscular power, but do not include traction engines, road rollers and such vehicles as run only upon a track."

In light of the above and foregoing, we conclude that "motorized carts, either gasoline or electric powered," are not motor vehicles within the purview of §13, Art. IX, of the State Const., except when operated over the public highways, roads and streets of this state for the purpose of transporting persons and/or property. Such motorized carts, when driven over the highways and roads of the state, including county and municipal roads, streets and highways, shall be subject to and must conform to all applicable regulations applicable to traffic on the highways, including Ch. 317, F. S. When operated on the highways, roads and streets, as aforesaid, such motorized carts, as motor vehicles, are liable to the license taxes imposed by Ch. 320, F. S., applicable thereto, and are not subject to ad valorem taxes under Ch. 200, F. S.

064-9—January 13, 1964

TAXATION

CHAPTER 212, F. S.; TRANSACTIONS CONCERNING BOATS
AND VESSELS—RENTALS, ETC. §§212.02(12), (16), 212.04,
212.05(3), (4), F. S.

To: J. Ed Straughn, Director of Revenue, Tallahassee

QUESTION:

Are the following transactions subject to taxation under Ch. 212, F. S., as amended, either as rentals, admissions or otherwise, to wit:

1. Boat or vessel chartered for a fixed sum, with the crew being furnished by the owner and the charterer having no control or direction over its operation;
2. Boat or vessel chartered for a fixed sum on a bare boat basis, the charterer having the control or direction over its operation;
3. Boat or vessel let by its owner for a consideration measured by the number admitted to or entering the boat or vessel, or by length of stay aboard, for the privilege of participating in a sport, recreation or other use thereof?

To charter a boat or vessel is to hire or lease such boat or vessel to another for a voyage or the carriage of goods and wares from one location to another. This relates primarily to the leasing

of a boat or vessel in whole, or in part. "A charter party is a specific form of contract which relates to vessels, and has often been called a 'mercantile lease.' More fully defined, a charter party is a specific contract, by which the owners of a vessel let the entire vessel, or some principal part thereof, to another person, to be used by the latter in transportation for his own account, either under their charge or his. It may be either an agreement by which the owner is to carry a cargo which the charterer agrees to provide, or an agreement for the entire surrender of the vessel, by the owner to the charterer who hires it." (80 C. J. S. 659, §26; 48 Am. Jur. 202, §206; Words and Phrases 678-680). In mercantile law, to charter is to hire or lease a vessel for a voyage. (Black's law dictionary).

A boat or vessel may also be used by its owner as a means of carriage of persons or property for a consideration. Carriage has been said to be the act of carrying, or the transportation of persons or property for a consideration. "In its primary sense, 'carriage' has been defined as the act of carrying; specifically the business of transportation." In *Kocke v. Garnier*, 15 La. App. 461, 131 So. 198, text 199, it was stated that the business of carriage is that "arising under contracts of various forms by which a person obligates himself, for an agreed price, to transport, or have transported, an object of some kind to a designated place."

"While a contract for floating storage may, under circumstances contemplate carriage in the limited sense of sustaining on water, the relationship between a vessel owner and the cargo owner is not necessarily that of private carriage in every case of a contract for floating storage." (80 C. J. S. 885, §106). A skating rink, theatre, or other business transacted in a boat or vessel may or may not constitute a means or manner of transportation, depending on the facts in each case. A theatre operated on a boat or vessel, permanently anchored in a navigable stream or body of water, is nevertheless a theatre. This would seem also to be true where the said boat or vessel moved over the navigable waters, when the primary use and purpose of the boat or vessel is the operation of a theatre, show business, or other type of business other than a transportation business. Although theatres, shows, and like and similar entertainment and amusement, are found on large passenger boats and vessels, such entertainment and amusement is a mere incident to the operation of such boats and vessels and not their main business. With floating shows, theatres, and similar businesses, the shows and entertainment are the main business and the use of the boat or vessel is an incident thereto.

Section 212.04, F. S., imposes an excise tax on persons who sell admissions "to any place of amusement, sport or recreation, or for the privilege of entering or staying in any place of amusement, sport or recreation, including but not limited to theatres, outdoor theatres, shows, exhibitions, games, races, or any place where a charge is made by way of sale of tickets, gate charges, seat charges, box charges, season pass charges, cover charges, greens fees, participation fees, entrance fees or other fees, or receipts of anything of value measured on an admission or entrance or length of stay, or seat box admission, in any place of business, or where there is any exhibition, entertainment, amusement, sport or recreation, "with certain specified exemptions from the said tax . . ." §212.02(16), F. S., provides that the term "admissions" as used in Ch. 212, F. S., as amended in 1963, "shall mean and include the net sum of money

after deduction of any federal taxes for admitting a person or vehicle, or persons, to any place of amusement, sport or recreation, or where there is any show, game or exhibition or where any charge is made by way of sale of tickets, gate charges, seat charges, box charges, season pass charges, cover charges, greens fee, all dues paid to private clubs providing recreational facilities, including but not limited to golf, tennis, swimming, yachting and boating facilities;" but granting exemption from such taxes for certain civic, fraternal and religious clubs and organizations. There would seem to be a distinction between a charge for being admitted to a boat or vessel for any lawful purpose, and a charge made and paid for the use of a boat or vessel between the owner thereof and a charterer thereof for the use of the boat or vessel.

A charter party is a contract by which the owner of a boat or vessel lets such boat or vessel or some part thereof to another for some lawful use and purpose, usually for the conveyance of persons or property, and would not be an admission charge within the purview of the above-mentioned statutes. Should a church, fraternal or other organization procure a passenger boat from its owner for a specified and fixed sum, a boat or vessel for the purposes of carrying church, fraternal or other group on an outing, the payment of the consideration for such use being the sole obligation of such organization and not of the persons going on such outing or otherwise, such sum paid would be a charter fee or charge and not admission fees for those who are carried on the said boat or vessel. Should the group chartering the boat or vessel make an admission or entrance charge of those carried on such boat or vessel, then such charges may well be an admission charge within the purview of said statutes. However, any voluntary contributions to the charterer who pays the consideration or charter fee for the use of the boat would not appear to be an admission charge. Should a church, fraternal or other group charter a boat or vessel for the purpose of taking its members or a portion of them on an outing, such as a fishing trip, a moonlight ride, or other recreation or sport, at and for a fixed charter fee, the same being the obligation of the said group, and not of individual members making the trip, the same would be in the nature of a charter party and would constitute the rental of tangible personal property. However, should the owner of a boat or vessel make the same available for such a use, his consideration for such use of the boat or vessel being an admission or entrance charge, or other fixed sum per person going on the boat, the same to be paid by such persons using the said boat or vessel, such charge or fee would seem to be an admission or entrance fee or charge within the purview of the above-mentioned F. S.

Where a boat or vessel is available for use as a fishing boat or similar use for a fixed charge per trip, without any substantial reduction in price when not carrying a full load; for instance, a deep sea fishing boat, having a capacity of 4 persons, or any other determined capacity, made available for a charge of \$40, for example, for a day's deep sea fishing, with no substantial reduction in the charge made for the use of the boat when less than four are carried, such a contract would seem to be a charter and not an admission or entrance charge. However, should the charge be \$10 per person, whether 1 or 4 persons are carried on the trip, such charges would appear to be in the nature of an admission or entrance charge and not a charter fee.

A boat or vessel used for transportation of persons or property over navigable waters appears to be within the definition of tangible personal property, contained in §212.02(12), F. S., so that the chartering of the same would appear to be the rental thereof within the purview of §212.05(3), F. S. Leases of tangible personal property have been subject to a 3% excise tax since the adoption of the sales and use taxing statutes in 1949 (see §5(c) and (d), Ch. 26319, 1949), now appearing as §212.05(3) and (4), F. S. The rental or leasing of boats and vessels, being tangible personal property, has been subject to a rental tax since the adoption of said Ch. 26319, 1949. The only change made in either of said subsections at the 1963 legislature was to change the phrase appearing in said subsection (3), "except the rental of motion picture film," to, "except the rental of motion picture film where an admission is charged for viewing such film." This amendment in no way changed the existing law as to the leasing or rental of boats and vessels, including the chartering thereof.

In the light of the above and foregoing statutes, authorities and observations, the 3 above stated questions are answered as follows:

1. A boat or vessel chartered (leased, let or rented) by its owner or owners to another or others for the carriage or transportation of persons or property, or for any other lawful purpose, whether furnished with or without crew, is within the purview of §212.05(3) or (4), F. S., the tax thereon being measured by the compensation or rental paid or obligated for the use of said boat or vessel. Where the crew is furnished by the owner or owners it is to be presumed that said crew is furnished without charge other than the compensation or rental paid or obligated for the use of the boat or vessel, unless it be otherwise clearly demonstrated to the taxing authority that the crew was separately furnished for a separate consideration.

2. Where such boat or vessel is chartered, leased, let or rented *on a bare boat basis*, the transaction would be one of leasing, letting or renting of tangible personal property within the purview of §212.05(3) or (4), F. S., and subject to taxation thereunder. The term "bare boat basis" is used herein as meaning a boat or vessel leased, let or rented without crew, or without supplies and materials.

3. Boats and vessels let by their owners for a consideration measured by the number admitted to or entering the boat or vessel, or their length of stay aboard, for the purpose of participating in a sport, recreation or other use thereof, may (a) include those cases where the lessee's obligation for the use of the boat or vessel is so determined, and paid by him on that basis and not by the persons using the said boat or vessel, or (b) those cases where, as a condition to his use of the boat or vessel for any of the purposes mentioned, each person admitted on or entering the boat or vessel for such purpose and use is required to pay an admission or entrance charge measured as aforesaid, either on entering or leaving the said boat or vessel, as a right for his use of the boat or vessel for the purposes mentioned.

Under (a) above discussed there would seem to be a chartering (lease or rental) of the boat or vessel for a fixed sum, such sum being payable by the lessee or charterer, and not by the persons using the boat or vessel, therefore, taxable under §212.05, F. S.

Under (b) above discussed there would appear to be an admission charge of each person entering the boat or vessel within the

purview of §212.02(16), F. S., as amended by §3 of Ch. 63-526, and §212.04, F. S., without regard to who makes the actual payment of said admission charge.

064-10—January 17, 1964

PUBLIC WORKS—WAGE RATE

MEANING OF "ANY AGGRIEVED PARTY" AS USED IN §215.19, F. S.—CH. 446, §446.09, F. S.; CH. 63-380, LAWS OF FLORIDA

To: Patrick H. Mears, General Counsel, Florida Industrial Commission, Tallahassee

QUESTIONS:

1. Is the phrase "any aggrieved party" used in §215.19, F. S., as amended by Ch. 63-380, in connection with the filing of a complaint for nonconformity with prevailing wage requirements limited to the employees of the contractor employed on the affected works?

2. What authority does the apprenticeship department possess in its administration of the apprenticeship program insofar as compliance with the prevailing wage law is concerned?

Section 215.19, F. S., requires that public contracts in this state involving a consideration in excess of \$5000, in the performance of which free laborers, mechanics and apprentices are engaged in connection with the construction of any public building or other public work, or the repair thereof "shall contain a provision that the rate of wages for all laborers, mechanics and apprentices . . . in the area in which the public work is located . . . shall be not less than the prevailing rate of wages for similar skills or classification of work in the city, town, village or other civil division of the State in which the said public work is located . . ." When the question arises as to what is the said prevailing wage in such location, the same is determined by the Florida industrial commission as required by said section of the statutes. If the contractor or subcontractor fails to pay said prevailing wage, "any aggrieved employee, on behalf of himself and other employees similarly aggrieved on the same job" may make such fact known to contracting authority and the contractor and subcontractor by "written sworn affidavit signed by each such aggrieved employee . . .," which affidavit shall be filed with the contracting party within the time specified in said section of the statutes.

However, "the contracting authority on its own initiative or upon the written complaint of any aggrieved party, may initiate its own investigation to determine whether any contractor or subcontractor has failed to comply" (Emphasis supplied.) with the above-mentioned requirement for a prevailing rate of wages in the location above mentioned. When the investigation is raised by the employees as aforesaid, it is to be instigated by the aggrieved employees, instead of any aggrieved party, as where instigated by the contracting authority aforesaid.

An aggrieved party has been defined as: "one who is injured in a legal sense, one who has suffered an injury to person or property (Re. Vetter's Estate, 139 Neb. 307, 297 N. W. 554, text 556); one who is injured in a legal sense, or one whose pecuniary

interests are directly affected (*State v. Central Vermont RR Co.*, 81 Vt. 459, 71 A 193); one whose personal or property right has been or is adversely affected (*McFarland v. Pierce*, 151 Ind. 546, 45 N. E. 706, text 707); one having an interest recognized by law which is injuriously affected (*Re. Fidelity Assurance Ass'n*, 247 Wis. 619, 20 N. W. 2d 638, text 641); one whose property, pecuniary and personal rights are adversely affected (*Sheets v. Benevolent and Protective Order of Keglers*, 34 Wash. 2d 851, 210 P. 2d 690, text 692 and 693); one having a substantial interest in the subject matter who is prejudiced by some order or action with such subject matter (*Simeon v. Superior Court*, 20 Wash. 2d 88, 145 P. 2d 1017, text 1019); one whose legal rights have been invaded (*American Surety Co. v. Jones*, 384 Ill. 222, 51 N. E. 2d 122, text 125); for a party to be aggrieved his interest in a subject matter must be substantially and directly affected (*American Petroleum Exchange v. Public Service Comm.*, 238 Mo. App. 92, 176 S. W. 2d 533, text 534 and 535); a person is aggrieved in a legal sense when a legal right of his is invaded or his pecuniary interest is directly affected (*Glos v. People*, 259 Ill., 332, 102 N. E. 763, text 766). The word *aggrieved* refers to a grievance, a denial of some personal or property right or the imposition upon some party of a burden or obligation (*Roullard v. McSoley*, 54 R. I. 232, 172 A. 326, text 327). Black's law dictionary defines the word "aggrieved" as referring to a substantial grievance, a denial of some personal or property right, or the imposition upon a party of a burden or obligation.

A "grievance" has been defined as "an injury, a wrong done, that which gives ground for complaint because it is unjust or oppressive." (38 C. J. S. 1078); as the imposition of some injustice or illegal burden or obligation upon a party, or the denial to him of some equitable or legal right (*State v. State Bank & Trust Co.*, 36 Nev. 526, 137 P. 400, text 402).

We conclude that the phrase "any aggrieved party" as used in §215.19(3) (e), F. S., refers to a person or party who, by reason of the failure of a public contractor to pay his employees "the prevailing rate of wages contemplated by said paragraph, subsection and section," suffers some direct denial of a substantial personal or property right by reason of such failure to pay the prevailing rate of wages contemplated by said statute. The persons employed by such a public contractor at a wage below the prevailing wage contemplated by §215.19, F. S., are aggrieved parties within §215.19(3) (e). Any labor union, or other person or agency having the status of a bargaining agent for the employees, may in their behalf, file the written complaint contemplated by §215.19, F. S. Any other person or agency duly authorized by the said apprentices may also file such written complaint in their behalf.

AS TO QUESTION 1:

We feel that the phrase "any aggrieved party" as used in §215.19, F. S., relates primarily to employees of the public contractor in question, although any other person directly and materially affected by the failure to pay the required wages may be also within the said phrase.

Chapter 446, F. S., creating a voluntary apprenticeship program and an apprenticeship council, establishes within the Florida industrial commission a department of apprenticeship (see §446.09, F. S.) The department under its director administers the provisions of Ch. 446 as follows:

... in cooperation with local joint apprenticeship committees, to set up conditions and training standards for apprentice agreements; to act as executive secretary of the council; to register any apprentice programs and agreements which meet the standards established by the council; to terminate or cancel any apprentice agreement in accordance with the provisions of such agreement; to keep a record of apprentice agreements and their disposition; to issue certificates of completion of apprenticeship in accordance with the council's standards; and to perform such other duties as the commission may direct." (Section 446.09(2), F. S.)

According to the provisions of §215.19(1)(d), F. S. (Chapter 63-380, *supra*), apprentices are employed pursuant to apprenticeship agreements registered with the department of apprenticeship. (See §446.09(2), F. S.). Said paragraph (d) also provides that contractors employing apprentices are required to file with the Florida industrial commission, "the name, classification and wage rate applicable to each apprentice employed by him."

I am advised that the wage rate for apprentices is determined by the apprenticeship agreement, which rate would be a percentage of the prevailing wage rate for laborers and mechanics employed in a given area.

A review of the pertinent sections of Ch. 446 and §215.19, *supra*, fails to indicate that the department of apprenticeship is vested with any authority to insure compliance with the prevailing wage law. On the contrary, the department is vested with the responsibility to effectuate the proper administration of the apprenticeship program. This would include examination of the information filed by the contractor or subcontractor pursuant to §215.19(1)(d), *supra*, for the purpose of determining whether those persons alleged to be employed as apprentices are, in fact, bona fide indentured apprentices properly registered with the department. In addition thereto, it would be proper for the department to determine whether the employer has complied with the wage rate (as distinguished from the prevailing wage law) for apprentices as contained in the apprenticeship standards. The investigations of the application of wage rates to apprentices would seem to be best accomplished by the local apprenticeship committee established pursuant to §446.11, F. S.

AS TO QUESTION 2:

In view of the above, it would seem that matters pertaining to the compliance with the prevailing wage law as distinguished from matters pertaining to apprenticeship agreements would be handled by the prevailing wage department of the Florida industrial commission rather than the department of apprenticeship, and as such, your question is answered accordingly.

064-11—January 17, 1964

WORKMEN'S COMPENSATION

CHIROPRACTORS FURNISHING MEDICAL SERVICES
UNDER §440.13, F. S.To: *E. M. Saunders, Florida Board of Chiropractic Examiners,
Ft. Myers*

QUESTIONS:

1. Is a chiropractor considered to be a "physician" within the contemplation of §440.13, F. S.?

2. Where medical services are furnished under §440.13, F. S. (workmen's compensation law), can an employer or his carrier direct or control the selection of a physician to treat an injured employee?

AS TO QUESTION 1:

According to the provisions of §440.13(1) F. S., an employer is required to furnish medical services and supplies "under the direction and supervision of a qualified physician or surgeon, or other recognized practitioner, nurse or hospital."

In opinion 041-166, (1941-42 Biennial Report of Attorney General, p. 572) my predecessor in office had occasion to reply to a similar inquiry presented by the then director of workmen's compensation division. It was held that a chiropractor was entitled to an award by the commission for the amount of fees for services rendered to an injured employee. The said opinion contained a detailed analysis of the phrase "qualified physician or surgeon" as used in §440.13, F. S. and concluded in effect that a chiropractor would be considered as a "physician" within the contemplation of said phrase. Said opinion is quoted in part as follows:

... Where the practitioner is licensed to practice the healing art by the lawful though limited methods of chiropractic and he is competent to treat the claimant in the particular case for the injury in question, then in my opinion he would be entitled to an award for such services performed by him.

* * *

I believe that the reasoning in the cases of *Shober vs. Industrial Commission* (Utah) 68 Pac. 2d, 756, and *Towers vs. Glider & Levin* (Conn.) 125 Atl. 366, is more nearly in accord with the purposes of our own Workmen's Compensation Act which, as I have said, seeks to bring about the injured workman's recovery as soon as possible in order that he may be returned to the ranks of productive labor, rather than create a monopoly in favor of any special school of medicine.

It is interesting to note that §440.13 F. S. has, since the writing of that opinion, been amended to include the additional phrase "or other recognized practitioner," which, in my opinion would include a chiropractor.

Question 1 is therefore answered in the affirmative.

AS TO QUESTION 2:

The provisions of §440.13, F. S., contemplate that the medical services and supplies will be furnished by the employer or his insurance carrier; the importance being, not the nomenclature of the person furnishing the service, but rather that medical services and supplies be, in fact, furnished.

According to the provisions of §440.13(2), F. S., if an injured employee objects to the medical services furnished by the employer (or carrier) it is the duty of the employer to select another physician *unless* the commission determines that such a change is not in the best interest of the injured employee. The commission is also permitted in its discretion to order a change in such medical attention at any time for good cause shown. Said subsection (2) also contains the following restriction on the selection of a physician:

... It shall be unlawful for any employer or representative of any insurance company or insurer to *coerce or attempt to coerce* a sick or injured employee in the selection of a physician, or surgeon or other attendant or remedial treatment, nursing or hospital care, or any other service that the sick or injured employee may require; and any employer or representative of any insurance company or insurer who violates this provision *shall be guilty of a misdemeanor* and upon conviction therefor shall be fined not less than twenty-five dollars and not more than one hundred dollars for each and every offense. (Emphasis supplied.)

Under the foregoing, it would seem that an employer or carrier may suggest or recommend the particular type of physician to treat an injured employee; if the employee raises some objections about this medical attention, the employer or the carrier is required to select or furnish another practitioner. However, if the employer or carrier attempts to force the employee to use a particular physician it would be contrary to the provisions quoted above. Any incidence of coercion should be brought to the attention of the commission.

Whether a carrier's recommendation or selection would constitute coercion would depend upon the particular facts surrounding a given situation. An initial selection by the carrier would not offend the provisions of §440.13, F. S., however, if the employee is forced to use only those practitioners selected by the employer or carrier, or is otherwise prevented from raising an objection to the initial selection of a practitioner, then it would be contrary to the provisions of subsection (2).

It is important for all parties concerned to recognize that the purpose of furnishing medical services and supplies is to bring about speedy recovery for the injured party. I am confident that the affected parties will cooperate together to effectuate the spirit and intent of the workmen's compensation act.

Question 2 is answered accordingly.

064-12—January 17, 1964

TAXATION

INTANGIBLE PERSONAL PROPERTY TAXES—OBLIGATIONS NOT PERSONALLY BINDING—§1 ART. IX, STATE CONST.; §§199.01, 199.02(3), (4), 192.03, 199.05, 199.11(3), F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Should the clerks of the circuit courts of this state record mortgages, deeds of trust, and other liens encumbering real property, given to secure the payment

of money, without the payment of an intangible personal property tax, when it is stipulated that the maker of such liability is not personally liable therefor?

Section 1, Art. IX, of the State Const., provides in part that, "as to any obligation secured by mortgage, deed of trust, or lien, the legislature may prescribe an intangible tax of not more than two mills on the dollar, which shall be payable at the time such mortgage, deed of trust or other lien is presented for recordation, said tax to be in lieu of all other intangible assessments on such obligations." This constitutional provision seems to have been implemented by §199.02(3), F. S., which provides in part that "Class C intangible personal property is hereby defined as being all notes, bonds and other obligations bearing date subsequent to December 31, 1941, for payment of money which are secured by mortgage, deed of trust or other lien upon real property situated in Florida . . ." §199.11(3), F. S., imposes an ad valorem tax upon such class C intangibles at the rate therein mentioned "which tax shall be due and payable when the mortgage, deed of trust or other lien is executed and shall be paid to the County Tax Collector before the mortgage, deed of trust or other lien securing such indebtedness is presented for record . . ."

Section 199.01, F. S., provides in part that, "intangible personal property" is hereby defined as all personal property which is not in itself intrinsically valuable but which derives its chief value from that which it represents . . ." §199.02(3), F. S., above quoted from, defines class C intangible personal property as notes, bonds and other obligations . . . for the payment of money which are secured by mortgage, deed of trust or other lien upon real property situated in Florida . . . Section 199.02(4) defines class D intangible personal property as "all other intangible personal property not embraced in Classes A, B or C." Black's law dictionary defines "intangible property" as property which has no intrinsic or marketable value "but is merely the representative or evidence of value, such as a certificate of stock, bonds, promissory notes and franchises." This definition of intangible personal property is quoted with approval in 73 C. J. S. 156, §5. It was held by a surrogate's court of N. Y. in *Boshart's Estate*, 177 N. Y. S. 567, text 573, (affirmed by the App. Div. of the supreme court of N. Y. in 177 N. Y. S. 574) that the vendor's rights under a contract of sale is intangible personal property; likewise in *Maricopa County v. Trustees of Ariz. Lodge, etc.*, 52 Ariz. 329, 80 P. 2d 955, text 957, as to conditional sales contracts. Open accounts, credits, promissory notes, bonds, shares of stock, bank deposits, judgments, etc., were held to be intangible personal property in *Crane Company v. City Council of Des Moines*, 208 Iowa 164, 225 N. W. 344, text 345; *People v. Goldfogle*, 234 N. Y. 345, 137 N. E. 611, text 612.

Many choses in action, such as notes, bonds, bills of exchange, bank deposits, state warrants, bills of lading, claim for liquidated damages, an executory contract, written contract for the sale of land, a breach of contract, the specific performance of a contract, and many other claims for money and for compensation, are intangible in nature and subject to classification as intangible personal property. (73 C. J. S. 155 and 156, 175-179, §§5 and 9). A promissory note secured by a mortgage encumbering real or personal property, accompanied by a stipulation in the said promissory note and mortgage that the maker thereof is not personally liable for its payment but that the payee or holder must look to the

mortgaged property is in effect a stipulation for payment from a particular fund and the said note is nonnegotiable (10 C. J. S. 532-533, §86; §674.04, F. S.). Such a note is not the personal obligation of the maker and is a conditional obligation.

The supreme court of Florida, in *State ex rel. Weinberg, Fla.*, 132 So. 2d 761, construed §201.08, F. S., imposing an excise tax on written obligations to pay money, as referring to the personal obligation of the maker of the instrument, and held that a promissory note, secured by a mortgage or lien encumbering real property, but containing a stipulation that the maker was not to be personally liable thereon and that the payee must look to the mortgaged property for payment, was not within the purview of said §201.08, F. S., and not taxable thereunder. The tax under said §201.08 is on the written obligation to pay money, not on the value of that written obligation to pay money. Section 199.05, F. S., provides that, "the tax assessor shall assess all intangible personal property at its full cash value." Section 192.03, F. S., defining "personal property" makes reference to "debts due or to become due from solvent debtors whether on account, contract, note or otherwise." The ad valorem taxes imposed under Ch. 199, F. S., upon intangible personal property are imposed upon the "full cash value" of that intangible, not on the written obligation to pay money, although in the case of a solvent obligor the written obligation to pay money and the full cash value of the intangible would in most cases be the same amount. In the case of an obligation payable from a specified fund or source, without the maker of the obligation being personally liable, the sum specified in the written obligation just mentioned would depend on the fund from which payable and not the solvency of the maker.

The question herein considered is answered in the negative. Although the maker of the obligation to pay money is not personally liable thereon, the same being secured by a mortgage on real property, such security would give the said obligation to pay money a value equal to the value of the security pledged for its payment, notwithstanding the want of a personal liability on the part of the maker of such obligation. The value of this security would measure the value of the obligation to pay money, and fix its full cash value, for purposes of taxation under Ch. 199, F. S.

064-13—January 29, 1964

TAXATION

CORRECTION OF ERRORS MADE IN CONNECTION WITH ASSESSMENT OF AD VALOREM TAXES—§192.21, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May errors of omission or commission made by the board of county commissioners in connection with tax equalization be corrected, and, if so, in what manner should such corrections be made and by whom?

We have examined your file handed us with the said request for opinion and find therein 2 resolutions, duly certified by the clerk of the circuit court, by the board of county commissioners in and for Hernando county, evidencing the correction of 2 errors

made by the said board in equalizing the 1963 real estate tax assessment rolls of the said county.

From 1 of the said resolutions it appears that the board in equalizing tax assessments on a parcel of land equalized the tax valuation of a $\frac{2}{5}$ interest in said parcel from \$8,000 to \$3,360, but failed to equalize the remaining $\frac{3}{5}$ interest in the said lands which the said resolution equalized from a total assessment of \$12,000 to a total assessment of \$5,040. From the second resolution it appears that the board equalized the total valuation of two parcels of land but inadvertently left unchanged the value of one of such parcels and applied the combined totals of both parcels to the other parcels, thereby erroneously increasing instead of reducing the said valuations. The said board by said resolutions directed, in 1 case, that the tax assessor make the correction and, in the other case, that the tax assessor and the tax collector make the correction. The tax assessor has refused to make the corrections as directed; the tax collector is willing to make the corrections if authorized.

It is provided in §192.21, F. S., that, "... no act of omission or commission on the part of any tax assessor, or any assistant tax assessor, or any tax collector, or any board of county commissioners, or any clerk of the circuit court, or any officer of this state, or any newspaper in which any advertisement of sale may be published, shall operate to defeat the payment of said taxes; but any such acts of omission or commission *may be corrected at any time by the officer or party responsible for the same* in like manner as is now or may hereafter be provided by law for performing the act in the first place, and when so corrected they shall be construed as valid ab initio..." (Emphasis supplied.)

The statutes seem to contemplate that the corrections mentioned be made by the person or persons committing or causing the error in the first place. When the tax rolls have passed into the hands of the tax collector or the clerk of the circuit court before the error is discovered, such tax collector or clerk of the circuit court should give the person or persons committing the error access to the tax rolls and permit the making of the corrections. When an error is made by the board of county commissioners sitting as a tax equalization board in an equalization, if the error is discovered while the tax roll remains in the hands of the assessor of taxes, the said board should advise the assessor of the error and he should make the correction of the same. However, should the assessor refuse to make the correction, then the board may direct its clerk (clerk of the circuit court) to correct the same, likewise, when the tax roll has passed into the hands of the tax collector or the clerk of the circuit court. Where, as in the cases before us, the board of county commissioners directs a change in the tax assessment, because of its error of omission or commission, by the tax assessor or tax collector, it may further provide that in the event of the refusal of the person so directed to make the correction that it be made by the clerk of the circuit court as clerk of the said board.

In the matter before us we are in agreement with the county attorney that the tax collector may under the facts and circumstances here involved make the corrections as directed by the board.

064-14—January 29, 1964

REGULATION OF VOCATIONS AND PROFESSIONS
QUALIFICATIONS OF TEACHERS FOR BARBER SCHOOLS—
§476.071, F. S.

To: W. E. Mincey, Jr., Chairman, Barbers Sanitary Commission,
Cocoa

QUESTION:

Do the provisions of §476.071(2)(d)(e) and (f) require that the person in charge of a barber school or college have completed a post graduate or course in barber teacher theory and have 2 years in an accredited college or university with courses covering certain sciences?

The provisions of §476.071(2) require certain conditions to be fulfilled by a prospective school or college of barbering before it will be approved by the barbers sanitary commission. Paragraphs (d) (e) and (f) contain the following provisions:

(2) No school or college of barbering shall be approved by the barbers sanitary commission and no license shall be issued to operate or conduct any such school or college of barbering unless and until the following provisions are complied with:

(d) The *manager, person or teacher in charge* of school must have had at least five years experience as a barber teacher in Florida before he may be put in charge of said school.

(e) The *teacher* shall have at least two years in an accredited college or university and shall have studied complete basic courses in hygiene, bacteria, sterilization and chemistry.

(f) The teacher shall have completed a postgraduate course in barber teacher theory in an approved school, which school shall regularly offer such a course. (Emphasis supplied.)

A reading of the foregoing provisions and in particular paragraph (d) indicates that the only requirement to be met before a person may be put *in charge* of a school or college is that he "must have had at least five years experience as a barber teacher in Florida." This paragraph further contemplates that a person can merely manage or be in charge of said school *without* doing the actual teaching. On the other hand, if a person is put in charge of that school and such person is to *additionally* do the actual teaching, then in that event it would be necessary to meet the conditions set forth in paragraphs (e) and (f) as well as any other conditions contained in §476.071(2), F. S. Conceivably, therefore, there could be 1 person in charge of the school having only the barber teacher experience *and* another person doing the actual teaching, who need not have such experience but rather have fulfilled the education requirements as set forth in subsection (2).

Your question is therefore answered in the negative.

064-15—January 29, 1964

HOTEL AND RESTAURANT COMMISSION
INTERPRETATION OF DEFINITION OF "MOTEL"—
§509.242(1)(c), F. S.

To: *R. A. Riedel, Florida Hotel & Restaurant Commission,
 Tallahassee*

QUESTION:

Is the phrase "off street parking for each unit" as used in the definition of the word "motel" in §509.242(1)(c) limited to the premises upon which the motel and the units are situated?

The various public lodging establishments have been classified by the legislature in §509.242, F. S. According to the provisions of paragraph (c) of subsection (1), an establishment, to be classified as a "motel" must fulfill the following requirements:

Any building or group of buildings, usually one story but limited to three stories, which offers units easily accessible to the travelers with an exit to the outside of each unit, daily or weekly rates, *off-street parking for each unit*, a central motel office on the property with specified hours of operation, a bath or connecting bath for every rental unit, and at least six rental units, recognized as a motel in the community in which it is situated and by the industry, is declared to be a motel. (Emphasis supplied.)

Your question is prompted by the fact that establishments which have requested classification as a motel are providing parking facilities across the street or elsewhere than on the actual premises wherein each of the motel units are situated.

In construing a statute where there is an ambiguity or uncertainty of the meaning in words, the intent should be ascertained by a consideration of the entire act so as to effectuate to the fullest degree the legislative intent. (State v. Burr, 99 Fla. 290, 84 So. 61.) The definition of the word "motel" in said paragraph (c) supra, contains language indicating that it is intended that travelers will have easy access to the units "with an exit to the outside of each unit." It would seem that if parking is to be located across the street from the unit or some other area other than where the unit is situated, the units would not appear to be "easily accessible to the travelers." I believe that the legislature, in preparing the classification for a motel, took into consideration a motel or motor court as is commonly recognized by the community, which would seem to contemplate that the traveler would be parking his car in front of or in close proximity to the unit which he will occupy.

Your question is therefore answered in the affirmative.

064-16—February 4, 1964

CRIMINAL PROCEDURE

**STATEMENTS AND CONFESSIONS—AVAILABILITY
 TO DEFENDANT—CH. 63-263, LAWS OF FLORIDA—**
§925.05, F. S.

To: *Angeline G. Weir, Assistant County Solicitor, Fort Lauderdale*

QUESTION:

What statements lie within the intent of the pro-

visions of Ch. 63-263, which require that the prosecution permit the defense to inspect and copy written or recorded statements or confessions whether signed or unsigned by the defendant?

The provisions of Ch. 63-263, §1 (now §925.05, F. S. 1963), are as follows:

Where any person is charged with an offense, upon motion of such person, at any time after the filing of the indictment or information against him, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph written or recorded statements or confessions whether signed or unsigned by the defendant. The order shall specify the time, place, and manner of making the inspection, and of taking copies, or photographs, and may prescribe such terms and conditions as are just.

The provisions of §925.05, F. S., are not only an innovation in the law of this state, but also represent one of the first formal legislative expressions in the country of defense discovery opportunity in relation to the defendant's statements. Therefore, both in-state and out-of-state authority interpreting the phrase "statements or confessions" as used in §925.05, *supra*, is lacking.

It may be argued with some plausibility that the terms "statements" and "confessions" as used in the above act are not limited to statements or confessions made by the defendant. This office does not feel that such contention is sound because of the following:

Section 925.05, *supra*, specifically provides that the defendant should be permitted access to statements and confessions *whether such are signed or unsigned by him*. This provision in the act clearly indicates that the legislature was speaking of statements or confessions made by the defendant when using the phrase "whether signed or unsigned by the defendant." The defendant's signature would not be expected to appear on statements or confessions made by those other than himself. The legislature therefore would not have felt the necessity of negating the signature requirement if the legislative act had been intended to relate to statements and confessions of parties other than the defendant.

The fact that §925.05, *supra*, provides the defendant with the right of inspection only after charges are filed against him clearly indicates the intent of the act to provide the defendant with access to information which would enable him to better prepare his defense. It is clear that material which would have no evidentiary value would be of little assistance in preparing a defense. Since statements or confessions made by parties other than the defendant seeking discovery would not be admissible against such defendant, it follows that the legislative intent in using the terms "statements or confessions" was to designate the statements and confessions of the defendant seeking discovery.

The next question which will be discussed is whether the scope of the terms "statements or confessions" as used in §925.05, F. S., is so broad as to include the general notes made by investigating officers and others which digest or outline the statements of the defendant, or whether the legislature intended only to provide the defendant with access to recorded statements of a verbatim nature made contemporaneously with their utterance.

Rule 17 of the federal rules of criminal procedure provides for

the production of "documents." Such rule has generally been given only the limited function of procuring the production of evidence to be introduced at trial. See 23 C. J. S., §955(3), p. 798. Although there is a conflict of authority in the federal court decisions, there have been federal opinions holding that rule 17 authorizes the accused to inspect his statements or confessions which are in the possession of the prosecution. See 23 C. J. S., criminal law, §955(3), p. 801. Where such statements or confessions have been made the subject of discovery, the scope of such discovery has been limited to those statements or confessions of the accused having the same characteristics as "statements" within the meaning of the Jencks act. (Title 18, U.S.C.A., §3500). The word "statement" as used in the Jencks act has been interpreted by the U. S. supreme court, in the case of *Palermo v. U.S.*, 360 U.S. 343, 3 L. Ed. 2d, 1287, 79 S. Ct. 1217, as including only statements of a *substantially verbatim* nature, taken *contemporaneously* with their verbal utterance. The court explicitly stated that the term "statement" did not include incomplete notes of a non-verbatim nature made by police officers as to what had been said by the defendant, nor did such term include or encompass notes which represented an agent's interpretations or impressions of what was stated by the defendant. The Jencks act only authorizes the production of prior statements made by witnesses who, in fact, testified, and such statements must be related to the actual testimony given by such witnesses. It is therefore clear that the terms of the Jencks act relate to statements having potential evidentiary value.

In light of what has already been stated in regard to the legislative intent to provide the accused with access to information of evidentiary value, it becomes apparent that non-verbatim notes, made by prosecution agents or others, outlining what was said by the defendant, would not be subject to discovery under §925.05, F. S., as such would not be admissible as evidence against the defendant.

Non-verbatim notes of this type would in effect be the producing agent's statement of what had been said by the defendant, rather than the statement of the defendant. It is, of course, possible that a defendant may adopt a non-verbatim statement as his own by giving his overt approval of the content of such statement. See *Patterson v. State*, 25 So. 2d 713. Under such circumstances, the non-verbatim notes become, in effect, the defendant's statement or confession and are admissible against him even though of a non-verbatim nature. Non-verbatim notes approved and accepted by the defendant would therefore be subject to discovery under the provisions of §925.05, supra.

In conclusion and summary it appears that the intent of §925.05, F. S., 1963, was to provide the defendant with access to statements or confessions having evidentiary value. General notes of a non-verbatim nature which outline what the defendant has stated and which may be used by police officers to refresh their memories when testifying as to what was said by the defendant, but which would not be directly admissible into evidence against the defendant, are not subject to the provisions of §925.05, supra. Recordings of a substantially verbatim nature of statements or confessions of the defendant, which recordings themselves would be directly admissible into evidence, lie within the provisions of §925.05, supra, and are subject to discovery by the defendant. A like

rule applies to recorded statements of a non-verbatim nature which have been approved by the defendant.

It should be noted, however, that this opinion does not justify disobedience of a court order requiring the prosecution to produce statements of a non-verbatim nature. Such court order should only be contested by seeking prohibition or certiorari and should not be contested by disobedience which would constitute contempt. See *State of Florida v. Lamp*, June, 1963, 155 So. 2d 10; *Brooks v. Owens*, 97 So. 2d 693, 695.

064-17—February 4, 1964

CRIMES

RECEIVING STOLEN GOODS—RESTORATION MADE— MISDEMEANOR OR FELONY—§§811.16, 811.17, F. S.

To: *Robert T. Adams, Jr., Assistant County Solicitor, Fort Lauderdale*

QUESTION:

Upon the first conviction under Florida Statute 811.16, and when the act of stealing the property was not, by law, a felony and the party convicted of buying, receiving, or aiding in the concealment of such stolen property, makes satisfaction to the injured party, to the full value of the property stolen, is he guilty of a felony or a misdemeanor?

The above question is answered by the case of *Tidwell v. Circuit Court of DeSoto County*, 9 So. 2d 630, wherein the supreme court of Florida stated:

(1) We are unable to follow this course of reasoning. The gravity of the offense was fixed at the time of its commission and the voluntary act on the part of the defendant in making restoration to the person whose property was stolen has no influence upon the nature of the crime or the jurisdiction of the court in which the matter should be tried, but only serves to diminish the character of the punishment if the defendant is eventually convicted.

The case of *Alvarez v. State*, 75 Fla. 286, 78 So. 272, indicated that restitution had the effect of reducing the crime from a felony to a misdemeanor; however, those portions of the *Alvarez* case which conflict with the *Tidwell* case have been expressly overruled by the *Tidwell* case.

It is therefore my opinion that under the circumstances stated in your question, the party convicted of buying, receiving, or aiding in concealment of stolen property is guilty of a felony, even though such party may not be sentenced to prison because of having made restitution to the injured party.

064-18—February 4, 1964

LOTTERIES

PROMOTIONAL CAMPAIGN BY FLORIDA DEVELOPMENT COMMISSION

To: *Ben Dickens, Attorney, Florida Development Commission, Tallahassee*

QUESTION:

Would a promotional campaign sponsored by the

Florida development commission, wherein visitors to Florida would submit photographs of themselves and their families showing them enjoying summer vacations in Florida, where prizes are given based on originality of subject matter and photographer's skill in portraying people enjoying themselves in Florida, constitute a lottery as prohibited by Florida Statutes?

A lottery has 3 elements: a prize, an award by chance, and a consideration, *Little River Theatre Corporation v. State*, 185 So. 855. Under the facts stated in the request for an opinion, it is evident that a prize is present and regardless of how nominal its value, this element would be found to exist.

Serious doubt is entertained as to whether a consideration exists. In an opinion rendered by my predecessor in office, dated Jan. 16, 1961, AGO 061-5, it was held that there was no consideration where the Orlando chamber of commerce sponsored a similar type contest.

Conclusive of the question, however, is the fact that there is no award by chance in this promotion. It is quite obvious that skill is the predominant factor. Skill in the selection of the subject matter and skill in the technical preparation of the picture itself would be the predominating factors in this promotional campaign. This is similar to a situation in which my predecessor rendered an opinion reported in the 1951-52 Biennial Report of the Attorney General, page 743, in which a contest required the participants to identify the location of photographic scenes and the holding was that skill and judgment supplanted the element of chance.

In light of the above, it is evident that the promotional campaign does not constitute a lottery as prohibited by the Florida Statutes and your question is most respectfully answered in the negative.

064-19—February 4, 1964

RETIREMENT

BENEFITS FOR CIRCUIT JUDGES UNDER §38.14, F. S.—
RESUMING OFFICE AGAIN—§§38.14-38.19, 123.03, 123.12,
123.13, 123.15; CHS. 123, 38, 25, F. S.; CH. 29838, 1955,
LAWS OF FLORIDA

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. May a circuit judge, appointed or elected after January 1, 1964, and who has accumulated prior service under Ch. 38, F. S., be allowed retirement credit for such service?

2. May a circuit judge, appointed or elected after Jan. 1, 1964, and who has accumulated prior service under Ch. 38, F. S., be allowed the benefit upon retirement of the so-called "Two-thirds Guarantee" as provided by Ch. 38 and reiterated in §123.13, F. S.?

3. May a circuit judge, appointed or elected after Jan. 1, 1964, and who has accumulated prior service under Ch. 38, F. S., become a member of the retirement system provided by said chapter, or should he become a member of division C of the retirement system provided by Ch. 123?

By way of example, a certain attorney of this state assumed the office of circuit judge in one of the judicial circuits of this state on June 13, 1945 and left his said office on Jan. 4, 1955, and again became circuit judge after Jan. 1, 1964. During his prior incumbency this circuit judge became and was, at the time of leaving office in 1955, a member of the circuit judges retirement system provided for in §§38.14-39.19, F. S., leaving the contributions made by him under said sections in the circuit judges retirement fund established by said sections of the F. S.

Chapter 29838, 1955, established a separate supreme court justices, district court of appeal judges and circuit judges retirement system, providing for salary deductions from the salary of each circuit judge who became a member of said retirement system which amounts deducted were payable into the retirement trust fund provided for in and by said Chapter. Said Chapter 29838, 1955, was brought into the Florida Statutes as Ch. 123, F. S. Section 3 of said Ch. 29838, as well as §123.03, F. S., recognizes the circuit judges retirement system provided for by §§38.14-38.19, supra, and makes provision for the transfer from said sections to Ch. 123, F. S., of members of said retirement system under §§38.14-38.19. The provision in §123.15, F. S., that: "The provisions of this law shall be compulsory for all supreme court justices, district court of appeal judges and circuit judges who take office for the first time on or after July 1, 1955, and the retirement provisions of chapters 25 and 38 shall not be applicable" to them does not appear to be applicable to the circuit judge hereinabove mentioned and described.

The circuit judge above described, if he left his contributions made under and pursuant to §§38.14-38.19, F. S., in the said retirement system, continued to be a member of the said retirement system upon assuming office recently, as above-mentioned, and may, under §123.03(3), F. S., transfer to the system established under and by Ch. 123, F. S., provided he complies with the provisions thereof. In opinion 058-70, 1958 (1957-1958 AGO 560), this office held that "where a circuit judge, previously under section 38.14, Florida Statutes, elects to come under Chapter 123, Florida Statutes, he may retire under the terms of said Chapter 123 without completing the twelve years of service required under said sections 38.14, et seq., Florida Statutes, so long as he meets the requirements of chapter 123," F. S.

AS TO QUESTION 1:

A circuit judge, appointed or elected after Jan. 1, 1964, who has accumulated prior service under Ch. 38, F. S., may be allowed retirement credit for such service.

AS TO QUESTION 2:

A circuit judge, appointed or elected after Jan. 1, 1964, who has accumulated prior service under Ch. 38, F. S., may be allowed the benefit upon retirement of the so-called "two-thirds guarantee" as provided by said Ch. 38 and reiterated in §123.13, F. S.

AS TO QUESTION 3:

A circuit judge, appointed or elected after Jan. 1, 1964, who has accumulated prior service under Ch. 38, F. S., may continue a member of the retirement system provided by said Ch. (§123.12, F. S.) or he may become a member of divisions A or B of Ch. 123, F. S., if otherwise qualified. In the light of §123.15, F. S., it is doubted that the circuit judge in question may become a member of division C and retain his credit under Ch. 38, F. S.

064-20—February 4, 1964

TAXATION

TAX STATUS OF CONDOMINIUMS WITHIN PURVIEW OF
CH. 711, F. S.—§§711.03, 711.04, 711.19, F. S.—§7, ART. X,
STATE CONST.*To: Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What is the tax status of a condominium, including condominium parcels, and homestead tax exemption rights, organized and existing under and pursuant to Ch. 711, F. S.?

It appears from the authorities that condominium type of real property ownership was recognized at common law (2 Tiffany Real Property, 3rd. Ed. 624 and 625, §626; 1 Thompson on Real Property, Perm. Ed., 70, §63; 1 Am. Law of Property, 198-202, §3.10; 4 Powell Real Property, 709-711, §§6 and 32; Washburn on Real Property, §342; 16 Am. Jur. 443, §9; 26 C. J. S. 605, §15). Condominiums are recognized and provided for in Ch. 711, F. S., and defined as a form of ownership of real property "under which units of improvements are subject to ownership by different owners, and there is appurtenant to each unit as part thereof an undivided share in the common elements. Condominium parcel means a unit together with the undivided share in the common elements which are appurtenant to the unit. Condominium property means and includes the land in a condominium, whether or not contiguous, and all improvements thereon and all easements and rights appurtenant thereto intended for use in connection with the condominium . . . Unit owner or owner of a unit means the owner of a condominium parcel." (§711.03, F. S.)

"A condominium parcel is a separate parcel of real property, the ownership of which may be in fee simple, or other estate in real property recognized by law." The transfer of title to a condominium unit transfers title to an undivided share of the common elements, the exclusive use of the apartment and the share of the common elements applicable to the assigned apartment, an undivided share in any common surplus and other appurtenances assigned to the said condominium unit. (§711.04, F. S.), and otherwise as provided in and by said Ch. 711, F. S. The apartment and all common elements and properties assigned and applicable thereto forms a condominium parcel or unit, which parcel or unit is under the statute and the common law real property of the owner thereof, and which parcel or unit is subject to separate taxation under §711.19, F. S., which property may be described in the same manner as described in the deed of conveyance to the purchaser or owner thereof. "Each condominium parcel shall be separately assessed for ad valorem taxes and special assessments as a single parcel. The taxes and special assessments levied against each condominium parcel shall constitute a lien only upon such condominium parcel so assessed and upon no other portion of the condominium property." (§711.19, F. S.) The condominium apartment and the undivided interests in the common properties assigned to it are a separate taxable property, and should be assessed for taxes separately and separate from all other taxable units of the condominium properties.

It is provided in §711.19(3), F. S., that it was "the specific intention of the legislature that the aggregate of all the homestead exemptions from taxation in any one building shall not exceed the sum of five thousand dollars irrespective of the number of units contained therein." This is in accord with the construction placed upon §7, Art. X, of the State Const. by the supreme court in *Overstreet v. Tubin*, Fla., 53 So. 2d 913, and by the district court of appeal, 3rd district, in *Gautier v. State*, Fla. App., 127 So. 2d 683, insofar as said section provides that "no such exemption of more than five thousand dollars shall be allowed to any one person or on any one dwelling house." (Emphasis supplied.)

Condominiums existing under Ch. 711, F. S., (Ch. 63-35) are not to be classified as cooperative apartments where title to apartment properties are held by a cooperative corporation organized and established under general corporate statutes and laws, where the members' right of occupancy and use is based on proprietary leases and leasehold interests, as well as on membership certificate or shares of stock evidencing the owner's membership in the cooperative corporation or association. In such cases the tax is usually assessed against the cooperative corporation and is paid by it and the members are billed for their proportionate part thereof. Condominiums are not owned by a corporation or association, as are cooperative apartments, but by the owners and occupants of the condominium parcels and apartments.

Section 711.04(1), F. S., describes a condominium parcel or interest as "a separate parcel of real property, the ownership of what may be in fee simple, or other estate in real property recognized by law." The quoted language appears to be in the nature of a limitation. "Real property" is referred to in Black's law dictionary as a "general term for lands, tenements and hereditaments." In 1 Thompson on Real Property, Perm. Ed., 65, §59, it is stated that "at common law 'real property' was deemed coextensive with lands, tenements and hereditaments, corporeal and incorporeal; and in this country, both by statute and common law, the term is generally used for the phrase 'lands, tenements and hereditaments'." "Generally, the terms 'real property' and 'real estate' embrace lands, tenements and hereditaments, and all rights thereto and interests therein." (73 C. J. S. 157, §7), and "imports an estate of freehold, which is an estate of inheritance or for life." (73 C. J. S. 159, §7). See also 42 Am. Jur. 195, §13. It is stated in *DeVore v. Lee*, 158 Fla. 608, 30 So. 2d 924, text 926, that "at common law estates for years were classified as chattels real and regarded as personal property." In *Matthews v. McCain*, 125 Fla. 840, 170 So. 323, text 325, it was remarked that "the lease in question was made for a term of five years. It was a chattel real..." "Chattels real are interests in real estate less than freehold, and are personal property, except as modified by statute." (42 Am. Jur. 206, §25). "Except insofar as the common-law rules have been modified by statute, terms for years, however long, are chattels real, falling within the classification of personal property." (51 C. J. S. 531, §26). It is doubted that, in the light of the said Section 711.04(1), F. S., that a condominium may legally exist on a lease for a term of years, as such interest would not be a real property interest but personal property interest.

We are, therefore, of the opinion that a condominium, and the condominium parcels or interests therein, are subject to ad valorem taxation, not on a condominium building as a whole, but

upon the condominium parcels or interests therein, as separate ownerships and property, said interests being subject to taxation as is other real property, and on the same basis. Owners of condominium parcels or interests who reside in their condominium apartments and make the same their permanent homes, or the permanent homes of persons legally or naturally dependent upon them, are entitled to homestead tax exemption on their apartment, unless they claim homestead tax exemption on other real property in the state. However, the combined total homestead tax exemption of all owners in the same condominium building may not be in excess of \$5,000. See also AGO 062-70.

064-21—February 10, 1964

STATE AND COUNTY OFFICERS AND EMPLOYEES

TRAVEL EXPENSES AND PER DIEM OF CIRCUIT JUDGES—

TRAVEL IN HOME COUNTY—§§26.52, 112.061, F. S.; §19, ART. V.; §§4A, 4B, 4C, AND 4D, ART. XVI, STATE CONST.; CH. 63-400, LAWS OF FLORIDA

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are circuit judges who have established their headquarters at a location other than the county seat of the county wherein they reside entitled to per diem and travel expenses from the county seat when traveling there on judicial business?

Section 19, Art. V, of the State Const., provides that "judicial officers shall be paid such actual and necessary expenses as may be authorized by law." Section 26.52, F. S., as amended by §19, Ch. 63-400, provides that "each circuit judge shall be reimbursed for traveling expenses as provided in Section 112.061." Section 112.061, F. S., referred to in §26.52, supra, was amended by §1 of said Ch. 63-400, and makes provision for the payment of travel expenses of public officers, employees and authorized persons when traveling at public expense. Said §112.061 divides travel for such purposes into 3 classes (classes A, B and C travel) of travel away from the traveler's *official headquarters*. Generally the "official headquarters of an officer or employee assigned to an office shall be the city or town in which the office is located. No allowance shall be made for meals when travel is confined to city or town of the official headquarters or *immediate vicinity*." (Emphasis supplied.)

In 67 C. J. S. 330, §91, it is stated that "unless the legislature has expressly and explicitly included in the expenses to be allowed public officers, the cost of travel from their homes to the places where their regular duties are to be performed, such expenses are not a legitimate public charge." See also *Thompson v. Frohmler*, 56 Ariz. 313, 107 P. 2d 375, text 376 and 377; and 1949-1950 AGO 32 (049-32).

In most counties the circuit judges' chambers, if any, are located at the county seat and common law trials are held there, but in a few of the counties civil trials are held at locations in the county other than the county seat (§§4A, 4B, 4C and 4D, Art. XVI, State Const.) and in some there are auxiliary circuit court chambers, auxiliary offices of the clerk of the circuit court, etc., (for

example, Ch. 27962, 1951, as to Volusia county; Ch. 24819, 1947, as to Pinellas county, and maybe in other counties). We are advised that auxiliary circuit court chambers have been established in Holly Hill, which is referred to as the Halifax law center, and that 1 of the circuit judges of the 7th judicial circuit maintains his offices and headquarters there, where hearings and probably common law and equity trials are or may be tried. This seems to be the official headquarters of such circuit judge, within the contemplation of §112.061, F. S., above discussed.

The above question is answered in the affirmative, unless the judge traveled from his home instead of from his headquarters to the county seat in which case he should be compensated for the shorter distance, whether from his home or from his headquarters.

064-22—February 20, 1964

TAXATION

TAX REFUNDS UNDER §193.40, F. S.—A.G.O. 062-119— FUNDS FROM WHICH PAYABLE—§129.06, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

When a refund of a tax is ordered pursuant to §193.40, F. S., should the county and county board of public instruction pay their respective pro rata portions thereof?

The said opinion answered this question as follows:

When a refund of a tax is ordered pursuant to §193.40, F. S., said section contemplates the payment thereof pursuant to the budget for the ensuing fiscal year, and not currently from county and school board current funds.

Said §193.40, F. S., after making provision for the refund of overpayment of taxes, payments when no taxes are due, and pursuant to litigation concerning the validity of a tax and a finding that all or a part of the tax was illegal, on order of the state comptroller, provides that the "board of county commissioners shall comply with the order of the comptroller in such matters by providing in the county budget for the ensuing year for the payment of such refunds and the board shall have authority to authorize such tax levies as may be necessary to provide the fund with which to make the refund as ordered." This statutory provision clearly contemplates the payment of the refund pursuant to the provisions to be made in a budget yet to be made and approved. The statute clearly contemplates the inclusion in the budget of the county commissioners for the ensuing (following) fiscal year of funds for the payment of the same.

Under §129.06(1), F. S., county budgets adopted and approved under and pursuant to Ch. 129, F. S., *have the effect of fixed appropriations* and no moneys may legally be paid therefrom unless provision for such payments be made in the said county budget. Under the state and the county budgetary systems, payments may be made from state or county funds only pursuant to an appropriation duly provided. As stated above, §193.40, F. S., contemplates that refunds made thereunder be made from funds budgeted in "the budget for the ensuing year." No provision is made in said

\$193.40 for payment of the refund from current budgets of either the board of county commissioners or of the county board of public instruction; said section contemplates the budgeting for such refunds in the county commissioners' budget for the ensuing fiscal year.

The general rule seems to be that refunds of taxes must be made under and pursuant to statutes, and that such refunds may be made only when authorized by statute and then in the manner provided by the statute (see 84 C.J.S. 1263, §361).

Although §193.40, F. S., contemplates payment of the refund from an appropriation to be made in the ensuing fiscal year, should funds be available for the making of such a refund from budgets for contingencies of the board of county commissioners and of the county board of public instruction, payment therefrom would not be illegal. When payment is to be made prior to the raising of a special fund by taxation, as is contemplated by said §193.40, it should be remembered that the unlawfully collected funds paid the taxing authorities have been paid into both the county fund and the school funds so that equity would seem to suggest that refunds be made by each board in proportion to the amount of illegal funds going into the respective funds.

064-23—February 20, 1964

LICENSE TAXES

MUNICIPAL OCCUPATIONAL FOR REAL ESTATE BROKERS AND SALESMEN—CHS. 205, 475; §§167.43, 205.02, 205.13, 205.52, 475.13, F. S.—§5, ART. IX, STATE CONST.

To: *Benjamin T. Shuman, Florida Real Estate Commission, Winter Park*

QUESTION:

Is there any provision or principle of law in the state of Florida which exempts real estate salesmen and brokers from the necessity of paying an occupational license tax imposed by a duly incorporated municipality?

The imposition of license taxes by the state, counties and municipalities is authorized by the provision in §5, Art. IX, of the State Const., that "the legislature may also provide for levying . . . a tax on licenses." Under §167.43, F. S., "the city or town council may raise, by tax and assessment upon all real and personal property, and by license on professions, business and occupations carried on within the corporation, all sums of money which may be required for the improvement and good government of the city, and for carrying out the powers and duties herein granted and imposed; . . ." Section 205.02, F. S., provides in part that "incorporated cities and towns may impose such further license taxes of the same kind upon the same subjects as they may deem proper, except when otherwise provided by law, but the license taxes so imposed shall not exceed fifty per cent of the state license tax, except as otherwise authorized by law." It was held in *State v. Keller*, 133 Fla. 335, 182 So. 779, that the proviso "except as otherwise provided by law" made inapplicable the proviso in Ch. 18011, 1937, (Ch. 205, F. S.) that municipal license taxes could not exceed 50% of the state license tax to the city of Tampa wherein a license tax of \$60 per annum was imposed where the

state license tax was \$10 per annum. See also *Canova v. Williams*, 41 Fla. 509, 27 So. 30; *Lenfesty Supply Co. v. Tampa*, 142 Fla. 610, 195 So. 412.

Chapter 475, F. S., appears to treat real estate brokers and salesmen as a regulated business, profession or occupation, §475.13 thereof imposing and levying on such real estate brokers and salesmen a regulatory fee, "there being imposed on real estate brokers a ten dollars per annum fee, on nonactive brokers a one dollar per annum fee, and on real estate salesmen a five dollars per annum fee," said section further providing that "no collector or county judge shall issue any real estate occupational license except upon presentation of an active registration certificate for that year." Section 205.13, F. S., provides that "fees or licenses paid any board, commission or officer for permits, registration, examination, inspection or other regulatory purposes shall be in addition to and not in lieu of any occupational license tax required by this chapter or other law unless otherwise expressly provided by law."

Section 205.52, F. S., imposes a state license tax of \$10 per annum upon the privilege of practicing or following a profession, the last sentence of said section providing that "this section shall include real estate brokers, but no license shall be required of their salesmen." Under §205.02, F. S., there would be imposed a \$5 per annum county tax on such real estate brokers, but no tax on real estate salesmen. Where not "otherwise authorized by law" or otherwise provided by valid municipal legislative charter or valid ordinances enacted pursuant thereto, there would seem to be no municipal license tax on real estate salesmen, but where so otherwise, the license tax, if any, on real estate salesmen would depend on the charters and ordinances of the particular municipalities.

We find nothing in the general statutes and laws of Florida exempting real estate brokers and salesmen, operating within municipalities, from license taxes, other than the provision in §205.52, F. S., above-mentioned, which is not applicable in those municipalities having legislative charter provisions and ordinances enacted pursuant thereto providing otherwise. Real estate brokers and salesmen operating in incorporated municipalities should check with their local municipal authorities as to their liability for municipal license taxes.

064-24—February 20, 1964

COUNTY ORGANIZATION, OFFICIALS, ETC.

AUTHORITY OF PINELLAS COUNTY ADMINISTRATOR—
CONSTRUCTION OF CH. 63-575, LAWS OF FLORIDA—
CH. 252; §§252.09, 252.10(1), 252.11(2), F. S.

To: *Page S. Jackson, Attorney, Board of County Commissioners,
Clearwater*

QUESTIONS:

1. Whether the Pinellas county civil defense organization, and the director and employees provided by the board of county commissioners pursuant to §252.09, F. S., come under the supervision and control of the county administrator as provided by Ch. 63-575, or whether the director and the employees are directly employed by

and answerable to the board of county commissioners rather than the county administrator?

2. Whether it is a violation of Ch. 63-575, for the board of county commissioners to require a department head to furnish information direct to the board relating to the necessity for creating an additional position or positions in the department, to be filled by the administrator according to the county merit plan and personnel rules, or whether the board must obtain such information through the county administrator?

AS TO QUESTION 1:

Chapter 63-575, a general law limited in its application to counties having a population of not less than 350,000 nor more than 385,000 inhabitants; viz., Pinellas county, requires the board of county commissioners of such counties to appoint an administrator to carry out all policies emanating from the statutory powers and authority of the board of county commissioners.

The administrator is to carry out the directives and policies issued to him as a result of official action of the board of county commissioners provided that he shall not be directed or authorized to appoint members to any county board, commission, or agency. He is authorized to employ personnel subject to the provisions of county merit system or similar plans upon authorization of the board of county commissioners. He is charged with the supervision of all departments, department heads, and employees of the county commission and in his discretion may terminate, for cause, the employment of any employees of the county commission except department heads. He is required to supervise all aspects of carrying into effect policies established by the board of county commissioners and to report the completion of such effort or to order that a full report be made to the board of action taken upon policies and directives of that body. (See §6(1), (2), (3), and (4), Ch. 63-575.)

The declaration of legislative intent as appears in §8 of said Ch. 63-575 provides "that the board of county commissioners shall not, in any manner, deal or interfere with the administrative service of county commission. That any such dealings shall be solely through the county administrator. . . ."

It should be noted that absent referendum approval at the primary election in May of 1964, said Ch. 63-575 will expire by operation of the law the first instant of Jan. 1965. (See §§13 and 14, Ch. 63-575.)

Members of the boards of county commissioners of the several counties of this state are ex officio members of the county civil defense council which each county is required to establish pursuant to the provisions of §252.09(1), F. S. Hence, it is the statutory duty of the members of the board of county commissioners to carry on the civil defense program in the county. Such duties and responsibilities are of equal dignity with other governmental functions which the board of county commissioners is required by law to perform.

As to persons employed in the civil defense program §252.10(1), F. S., recognizes the powers, duties, rights, privileges, and immunities of persons so employed while engaged in civil defense activities outside the geographical limits of the county as though they were performing their duties in the political subdivision in which they

are normally employed. Similar provisions appear in §252.11(2)(b), F. S.

The above noted sections of Ch. 252, F. S., the Florida civil defense law, and of Ch. 63-575, lead to the conclusion that persons engaged in county civil defense activities are within the jurisdiction of the county administrator and are not answerable directly to the board of county commissioners of Pinellas county. Question 1 is answered accordingly.

AS TO QUESTION 2:

Examination of Ch. 63-575 reveals it to be a unique legislative pronouncement in the field of county governmental functions in the state of Florida. When considered in its entirety, said chapter provides a formula for the economical and efficient conduct of the county affairs by making the county administrator established by the act responsible for the proper handling of all things necessary to accomplish and bring to fruition the policies established by the board of county commissioners of Pinellas county.

The legislature, by enactment of said chapter, placed in the hands of the county administrator the multitude of details which must necessarily arise from the operation of the county. Thus, the board of county commissioners is free to perform, without unnecessary interruption, its fundamental intended purpose of making policies within the framework of laws applicable to the government of Pinellas county.

The provisions of said Ch. 63-575 clearly delineate the authorities and responsibilities of the administrator and the function of the board of county commissioners in connection with the operation of the county under said chapter.

It would appear advisable that in this new concept of county government as provided by said chapter, a spirit of close cooperation between the board of county commissioners and the administrator, with respect for the functions of each, be maintained.

It is my opinion that because of §6(1), (2), (3) and (4) of Ch. 63-575, as well as the legislative intent as declared by §8 of said chapter, any plan under which the board of county commissioners of Pinellas county deal directly with the department heads on administrative matters would contravene the obvious purpose of Ch. 63-575.

Hence, if it is the desire of the board of county commissioners of Pinellas county to secure statistical information concerning the operation of a particular county department to assist that board in determining the need for employment of additional personnel in such department, the board should call upon the administrator to secure the desired information for presentation to the board. Question 2 is answered accordingly.

064-25—February 20, 1964

COUNTY DEPOSITORIES

BOARDS OF PUBLIC INSTRUCTION—REVOLVING PLAN FOR DESIGNATION AS DEPOSITORY OF COUNTY SCHOOL FUNDS—CH. 136, §136.02(1), F. S.

To: *Thomas D. Bailey, Superintendent of Public Instruction,
Tallahassee*

QUESTION:

In distributing its deposits on a pro rata basis under

Ch. 136, F. S., may the board of public instruction institute a revolving plan whereby a certain number of banks would be grouped together and the total of their combined pro rata shares be deposited in 1 bank of the group for a period of 5 years, after which the deposit would be placed with another bank in that group, said arrangement continuing until each bank in the group had served as the depository?

Section 136.02 (1), F. S., provides, in part:

Any bank as described in the foregoing section desiring to become a county depository as herein provided shall make satisfactory deposit with or to the credit of the comptroller of the state, of securities of the kind herein authorized approved by the comptroller and in an amount to be determined by the comptroller, . . . When a bank or banks in the county offer satisfactory inducement as to security as herein provided, the comptroller of the state shall issue his certificate showing that said bank has qualified as a county depository, . . . When a bank or banks in the county qualify as a county depository as herein provided, such bank or banks shall be eligible to receive deposits of the funds of the officers and boards herein mentioned, and shall be entitled to its or their pro rata share of the deposits of the board of county commissioners and board of public instruction of such county; . . .

Touching on this question, the attorney general on Aug. 13, 1930, issued an opinion (biennial report AGO 1929-1930, pp. 230, 231) which stated in part:

In my opinion the statute should be construed as giving to any bank which meets the conditions prescribed by Section 2405 an absolute right to become a county depository and receive its fair share of county deposits, when it complies with the conditions set forth in that Section. . . .

The requirements in the present statutes in so far as this question is concerned remain unchanged.

It therefore seems clear that each bank in the county which has qualified as a depository of county funds in accord with Ch. 136, F. S., is entitled to its pro rata share of school funds deposits.

I believe, however, that if all banks in the county which are qualified as county depositories, by written agreement, request the school board to deposit each year its funds in a qualified bank designated by the entire group, that said arrangement would be legally acceptable.

It should be noted, however, that new banks created after the agreement is made which qualify as county depositories would not be bound by the arrangement and would under §136.02(1) be entitled to their pro rata share of school fund deposits unless they voluntarily agreed to the arrangement contemplated.

064-26—February 20, 1964

COUNTY SCHOOL PERSONNEL

AGE FOR COMPULSORY RETIREMENT—ELIGIBILITY FOR
SUBSTITUTE TEACHING THEREAFTER—§§231.36,
231.47, 238.07, F. S.

To: *Thomas D. Bailey, Superintendent of Public Instruction,
Tallahassee*

QUESTIONS:

1. May a county board employ, either as a substitute or regular teacher, a person who is not a member of the state teachers' retirement system after he has attained an age in excess of 70 years?

2. Under the provisions of §231.36(5), F. S., may a teacher who is 70 years, or more, be re-employed by a county board during a period of emergency or critical need?

Section 231.36(5), F. S., provides:

Any member who has retired may interrupt retirement and be reemployed in any public school during periods of emergency or critical need as determined by the county school board; any member so reemployed by the same county from which he retired shall be entitled to continue on the same contractual basis that existed immediately prior to retirement.

In AGO 050-271 issued to the state superintendent of public instruction by this office on June 6, 1950, it was noted that "... the Legislature has fixed the age for compulsory retirement at 70 years." I concur in this position.

The Florida law referred to above, §238.07, F. S., has not been amended since 1950 in so far as this specific question is concerned.

We note that the pertinent language in §238.07(1) is as follows: "*Any member who attains seventy years of age shall be retired forthwith.*" (Emphasis supplied.)

It is my opinion that the legislature intended to include all regularly employed teachers in this limitation regardless of their status as "members" of the teachers' retirement system and that the legislature intended to provide that all regularly employed teachers must retire upon reaching age 70 or at the end of the school year after reaching age 70, at the discretion of the county school board.

Provision is made in §231.47, F. S., for the employment of substitute teachers in emergency situations in accord with county board regulations. Substitute teachers called in on a temporary basis during a period of emergency or critical need would not necessarily be barred by the 70-year age limitation since they are not regularly employed teachers under contract.

Pursuant to this act and the provisions of §231.36(5), *supra*, it is my opinion that substitute teachers over age 70 could be properly called back into active teaching during emergencies for not more than 10 days at any one time as provided by §231.47, F. S. During such periods of temporary employment the teacher would not make contributions to the teachers' retirement system and their status as retired teachers would not otherwise be affected.

It is conceivable that teachers over 70 who are not and have

never been members of the Florida teachers' retirement system might apply for teaching positions in Florida. I do not believe that the legislature intended to place these persons in any more advantageous position than our teachers who have been employed in Florida many years and have retired because of the 70-year compulsory retirement restriction.

Your first question is therefore answered in the negative, assuming you have reference to regular employees under contract.

Your second question is answered in the affirmative in accord with the above discussed limitations.

064-27—February 24, 1964

**STATE AND COUNTY OFFICERS AND EMPLOYEES
PUBLIC RETIREMENT SYSTEM—TAX SHELTERED
ANNUITIES—DEDUCTION FOR—RETIREMENT
PAY—CHS. 122, 123, 129, 238, F. S.**

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. May a public agency, body or officer purchase tax sheltered annuities from funds under its or his jurisdiction or control, for its or his members or employees, reducing the annual or other compensation of such member or employee by the amount of the cost of such annuities?

2. If the first question is answered in the affirmative, should the cost of such annuity be added to the compensation actually paid to such members and employees in determining their average final compensation for use in determining benefits to be paid under the retirement systems?

Tax sheltered annuities appear to be annuities purchased by an employer for the benefit of an employee or employees and are in the nature of trusts from which payment will be made to the employee or employees in future years, and when so paid will be deemed income of the employee or employees for the year in which paid. The amounts paid by the employer into a tax sheltered annuity may be deducted when calculating the income of the employer for federal income tax purposes where applicable. Such a plan seems to provide in effect for delayed compensation of an employee so that it will be deemed income of the employee or employees in the year or years in which paid instead of in the year in which the employee or employees services were paid. For this to be accomplished the applicable federal statutes must be complied with, and whether complied with is a federal and not a state question. We shall presume, *but not decide*, that the plan adopted and followed conforms to the federal statutes.

The State Const., the Florida Statutes, and laws provide for the selection and election or appointment of state and county officers, and for the employment of state and county employees and for their compensation. Such constitution, statutes and laws, provide for, and appropriate funds for the payment of such compensation in the form of salary, fees or other compensation. No money may be drawn from the state treasury except in pursuance of appropriations made by law, such constitutional and statutory

provisions meet this requirement, and Ch. 129, F. S., and other county and local budgetary statutes and laws regulate payments from county and local funds.

State, county and local officers, boards, commissions, etc., have no authority, in the absence of an appropriation therefor made by the legislature, or in accordance with statutes and laws of the state, to purchase so-called tax sheltered annuities for their officers and employees and make payment therefor, absent the authority or consent of such officers or employees. The fact that a state, county or local officer or employee may voluntarily execute and deliver an agreement or directive that a certain sum be taken from the salary payable to him, from time to time or otherwise, and used by the paying authority to purchase an annuity for him to be payable to him in the future, would not affect the amount of compensation or salary payable to him, although by the purchase of the annuity his receipt of such salary or compensation might be delayed. Such a purchase of an annuity for the officer or employee would not seem to affect the salary or compensation of the officer or employee for purposes of retirement under Chs. 122, 123 or 238, F. S., or other statute or law providing a retirement system, unless otherwise specifically provided by law. See AGO 063-160 of Dec. 31, 1963, to the same effect as to school teachers.

1. The first question is answered in the negative, except to the extent that the officer or employee entitled to the compensation may otherwise direct or agree. With the direction or consent of the employee, and the consent of the paying authority, we see no reason why funds may not be used by the paying authority to purchase, for the account of the employee, an annuity as contemplated by the first question. Whether this conforms to the federal income statutes is a federal and not a state question and is not here answered.

2. In the event the annuity is purchased, in accordance with the last above sentence, the cost of the annuity should be added to the compensation actually paid to such members and employees in determining the average final compensation for use in determining benefits to be paid under retirement systems.

064-29—February 24, 1964

SUPERINTENDENTS OF PUBLIC INSTRUCTION

COMPENSATION—POLK COUNTY—CH. 145; §§145.08, 145.13, 230.302, F. S.

To: *Thomas D. Bailey, Superintendent of Public Instruction, Tallahassee*

QUESTION:

Should the salary of the county superintendent of Polk county be \$15,000 as provided by §145.08, F. S., 1963, or is it fixed by §230.302 of said Statutes?

Chapter 145, F. S., relating to compensation of county officials, in §145.08 provides that the salary of the county school superintendent in Polk county shall be \$15,000 per annum. This is a 1963 act and would appear to prevail except for the provision of §145.13 (a 1961 act as amended in 1963) which states:

Construction of chapter 145.—Chapter 145 shall not be construed to repeal, affect or modify any local or spe-

cial law, or general law of local application enacted prior to or during this session of the legislature as to compensation of county officers, travel expenses of county officers or payment of extra compensation to the chairman of any board of county commissioners or board of public instruction; provided, however, if any county officer's compensation prescribed herein is more than that provided in any local or special law, or general law of local application, this law shall control and be applicable, except that the salary provided in a local bill adopted by a referendum shall control whether such amount is over or under the amount provided for herein.

Section 230.302, F. S., fixes the salary of county school superintendents in counties of less than 200,000 population on a formula basis.

I am advised that under the formula provided in §230.302 the salary of the superintendent of public instruction in Polk county is more than the \$15,000 provided by §145.08, F. S.

In view of the language in §145.13 above quoted, it seems clear that the school superintendent in Polk county should be paid in accord with the formula provided by §230.302, F. S.

064-30—February 26, 1964

TAXATION

DOCUMENTARY STAMP TAXES—PROFESSIONAL SERVICE CORPORATIONS, ISSUANCE OF STOCK—CH. 621; §§201.04 AND 201.05, 621.05, 621.07, 621.09, 621.11, 621.13, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are the shares of corporate stock issued by professional service corporations, incorporated under and pursuant to Ch. 621, F. S., subject to documentary stamp taxes under §§201.04 and 201.05, F. S.?

The general rule is that, in the absence of statutes providing otherwise, a corporation cannot lawfully engage in a profession, especially professions regulated by law which require the obtaining of a license to practice from some state board, commission or other agency (13 Am. Jur. 838 and 839, §837; 18 C. J. S. 428 and 429, §47; 19 C. J. S. 400-412, §956; *In Re The Florida Bar, Fla.*, 133 So. 2d 554, text 555). Chapter 621, F. S., authorizes the incorporation of professional service corporations in this state by "an individual or group of individuals duly licensed or otherwise legally authorized to render the same professional services within this state. . ." Such individuals or groups of individuals "may organize and become a shareholder or shareholders of a professional corporation for pecuniary profit under the provisions of Ch. 608 for the sole and specific purpose of rendering the same and specific professional service." (§621.05, F. S.)

It is provided in §621.07, F. S., that "any officer, shareholder, agent or employee of a corporation organized under this act shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him, or any person under his direct supervision and control, while rendering professional service on behalf of the corporation to the person for

whom such professional services are being rendered. The corporation shall be liable up to the full value of its property for any negligent or wrongful acts or misconduct committed by any of its officers, shareholders, agents or employees while they are engaged on behalf of the corporation in the rendering of professional services."

It is provided in §621.09, F. S., that "no corporation organized under the provisions of this act may issue any of its capital stock to anyone other than an individual who is duly licensed or otherwise legally authorized to render the same specific professional services as those for which the corporation was incorporated . . ." Under §621.11, F. S., "no shareholder of a corporation organized under this act may sell or transfer his shares in such corporation except to another individual who is eligible to be a shareholder of such corporation, and such sale or transfer may be made only after the same shall have been approved, at a stockholders' meeting specifically called for such purpose, by such proportion, not less than a majority, of the outstanding stock as may be provided in the certificate of incorporation or in the bylaws . . ." Under §621.13, F. S.: "A professional corporation organized under this act shall consolidate or merge only with another domestic professional corporation organized under this act to render the same specific professional service and a merger or consolidation with any foreign corporation is prohibited."

This office, in AGO 061-139, of Sept. 12, 1961, took note of the possibility of a professional man or woman holding all of the capital stock of a professional corporation and dying intestate, with his or her properties descending to and vesting in non-professional heirs, in which case it was held in said opinion that the corporation might, by amendment, be converted into a non-professional corporation and continue as such.

Although corporate stock in a professional corporation organized and existing under Ch. 621, F. S., is limited as to sale and transfer as above-mentioned, such shares of stock represent at least an equitable interest in the said professional corporation, and may be transferred to another person of the same profession, and is doubtless an item of intangible personal property in the hands of its owner. Such shares of stock, notwithstanding the limitations above-mentioned, are within the purview of §201.05, F. S., as to its original issue, and within the purview of §201.04, F. S., as to transfers.

064-31—February 26, 1964

CLERKS OF CIRCUIT COURT

RECORDING OF MAPS AND PLATS—§177.11, F. S.

To: *Clyde J. Keys, Clerk of Circuit Court, Clearwater*

QUESTION:

May the clerk of the circuit court refuse to record a map or plat which is not drawn on tracing cloth as required by §177.11, F. S.?

Section 177.11, F. S., requires the owner or owners of the property to be subdivided to present to the county clerk "a map or plat of the land platted drawn on tracing cloth together with a print or photographic copy of the tracing made on cloth." A statute must be given its plain and obvious meaning. Maryland

Casualty Co. v. Sutherland, 125 Fla. 282, 169 So. 679. On its face, the statute appears to be unambiguous. Furthermore, the word "shall" is generally construed as being mandatory rather than permissive. *Farrington v. Flood*, 40 So. 2d 462 at 465. For these reasons, if the owner or owners do not comply with the mandatory provisions of §177.11, F. S., with respect to maps or plats being drawn on tracing cloth, the clerk of the circuit court must refuse to record such map or plat.

In construing a statute, the legislative intent is the polar star by which the courts must be guided. *Ervin v. Peninsular Telephone Co.*, 53 So. 2d 647; *Smith v. Ryan*, 39 So. 2d 281; *Fla. State Racing Com. v. McLaughlin*, 102 So. 2d 574. The intent of a valid statute is the law, and it is ascertained by a consideration of the language and purpose of the enactment. (Emphasis supplied.) *Watson v. Holland*, 155 Fla. 342, 20 So. 2d 388. In construing and applying a statute, the language used, the subject regulated, the purpose designed to be accomplished, and the means adopted for accomplishing the purpose should be considered to ascertain the legislative intent which alone has the force of law. (Emphasis supplied.) *Tyree v. Hyde*, 60 Fla. 389, 52 So. 968.

The purpose of the legislature in requiring that a plat of the land platted drawn on tracing cloth, together with a print or photographic copy of the tracing made on cloth be presented to the clerk for recording was to provide a permanently legible record which could be reproduced from time to time. This purpose is made apparent by a consideration of §177.12, F. S., which provides that the clerk shall file the plat on tracing cloth in a book of the proper size so that it shall not be folded, and that said book shall be kept in a vault. Section 177.12, F. S., further provides that the print or photographic copy on cloth shall be filed in a similar book and kept in the clerk's office for the use of the public. The legislature knew well that constant use of the plats by the public would, with the passage of time, make them illegible. Consequently, the legislature has required that a copy of the plat drawn on tracing cloth be stored in a vault so that new prints or photographic copies may be made from time to time.

In view of the above authorities and applicable mandatory statutory provisions, I am of the opinion that a proffered map or plat which fails to satisfy the requirements of §177.11, F. S., is not entitled to recordation; and because of such fundamental defect, the clerk of the circuit court is unauthorized to accept such proffered map or plat to be spread upon the public records. The question presented is answered in the affirmative.

064-32—March 9, 1964

ELECTION CODE

PLACEMENT OF NAME ON BALLOT CONTRARY TO WISHES OF INDIVIDUAL CONCERNED—§§103.101, 103.021(3), F. S.

To: Tom Adams, Secretary of State, Tallahassee

QUESTION:

In an instance where a political party convention delegate slate has indicated a preference and qualified under the provisions of §103.101, F. S., should the name

of the potential preferred nominee appear on the ballot when he makes known to the secretary of state, that his name has been submitted without his consent and further makes known his desire that his name not be placed on the primary ballot?

In the instant situation a nominating petition was filed under the provisions of §103.101, F. S., in which a delegate slate expressed a preference for former vice president Richard M. Nixon. Subsequent to the filing of the petition the secretary of state received from Mr. Nixon a telegram in which he stated:

I have just learned that an effort is being made to enter my name in the Florida presidential primaries. In view of the fact that this action was not authorized by me and in accordance with my decision not to enter my name in presidential primaries I respectfully request that you take whatever action is appropriate under the law of Florida to keep my name from being entered on the Florida presidential primary ballot.

Although there do not appear to be any Florida precedents directly on point it does seem that we may be guided by the conclusion reached 4 years ago when governor Orval Faubus of Ark. requested the removal of his name following the receipt of petitions filed under the provisions of §103.021(3), F. S., which would have placed his name on the general election ballot.

In that case my predecessor, attorney general Ervin, concluded in AGO 060-171, p. 721, 1959-60 biennial report, addressed to secretary of state R. A. Gray, that Mr. Faubus had a right of privacy which might be unlawfully invaded by placing his name upon the ballot over his objection and therefore governor Faubus was "within his legal right when he demanded that his name be not so used." Citing *Cason v. Baskin*, 155 Fla. 198, 20 So. 2d 243, at 248, *La Follette v. Hinkle*, 131 Wash. 86, 229 P. 317, 77 C. J. S. 396, 409-413, *Right of Privacy*, and §§1 and 5, 41 Am. Jur. 940-41, *Privacy*, §21, Annotation, 138 A.L.R. 22.

A petition to mandamus the secretary of state to place governor Faubus' name on the ballot was subsequently filed in the Florida supreme court. In their brief the petitioners argued that governor Faubus was merely a "symbol name" whereby presidential electors might be voted for." The respondents on the other hand argued the right of privacy theory. The court denied the petition for mandamus in *Burch v. Gray*, Fla., 125 So. 2d 876, in effect upholding the right of privacy theory and thereby sustaining the previous position of the Florida attorney general.

In this instance the delegate petition has been filed with a "symbol name" expressed as a preference so that electors might express themselves with regard to delegates qualified to support that name. Thus the situation here seems sufficiently analogous to the Faubus case decided in *Burch v. Gray*, supra, to conclude that any individual has certain inalienable rights of privacy and that his name should not be submitted to public consideration without his consent for to do so would be contrary not only to the law but the dictates of common sense as well.

Accordingly this office is of the opinion that Mr. Nixon is within his legal right in requesting that his name not be used on a public election ballot. Your question is answered in the negative.

In conclusion this office would, out of an abundance of caution, suggest that you obtain a duly authenticated request from Mr.

Nixon before taking formal steps to omit his name from the primary ballot.

064-33—February 27, 1964

RETIREMENT SYSTEMS

STATE AND COUNTY OFFICERS AND EMPLOYEES—
STATUS OF COUNTY DEVELOPMENT AUTHORITIES—
CHS. 57-1226, 59-1903, LAWS OF FLORIDA; CH. 122,
§122.02, 122.16, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are officers and employees of county development authorities, created and established by the Florida legislature, employees within the purview of Ch. 122, F. S.?

We are here concerned with certain county development authorities created by the Florida legislature; for example, see Ch. 57-1226, creating the Clay county development authority, and Ch. 59-1903, creating the Suwannee county development authority, each said authority having been created "for the purpose of performing such acts as shall be necessary for the sound planning for and development of" the said counties. The said acts provide that there "is created a body corporate and politic to be known" as the county development authority of the county named "which shall be deemed to be a public corporation . . . which body may contract and be contracted with and sue and be sued in all courts of law and equity." The number of members constituting the authority is fixed by the said acts, the first slate of members having been named in the said acts, and subsequent members to be appointed by the governor of Florida. Membership terms, after the first slate of members is appointed, are for terms of 4 years each. The county wherein the authority operates, and municipalities, are given power and authority to "enter into contracts with the authority as a public corporation."

Among the powers and duties of the authority provided by the acts creating them is the power to acquire and dispose of real and personal property, and to use the same for the purposes mentioned in the acts; to select and appoint or employ agents and employees; to enter into contracts within the purview of the said acts; and to do and perform many things usually within the powers of corporations generally. The authorities are without power to create debts and obligations against the counties or the state. Section 3, Ch. 57-1226, and §3, Ch. 59-1903, recite that the development authorities thereby created and established "shall be deemed to be a public corporation." The court, in *Forbes Pioneer Boat Line v. Bd. of Com.*, 77 Fla. 346, 82 So. 346, text 350, stated that "a corporation is public when created for public purposes only, connected with the administration of government, and where the whole interests and franchises are the exclusive property and domain of the government itself." To the same effect see also *State v. Knowles*, 16 Fla. 577, text 593, and *County Commissioners v. King*, 13 Fla. 451, text 470; 13 Am. Jur. 171, §17, note 9. Bridge and port authorities have been held to be public corporations (*Maine-New Hampshire Interstate Bridge Authority v. Ham's*

Estate, 92 N. H. 277, 30 A. 2d 7, text 10; Estrada v. Parking Associates Corp., 236 N. Y. S. 2d 403, text 404, toll bridge authority), as have housing authorities (35 Words and Phrases, Perm. Ed., 127). In California Toll Bridge Authority v. Kelly, 218 Cal. 7, 21 P. 2d 425, the said toll bridge authority was held a public corporation.

These county development authorities are clearly public corporations of either the state of Florida or of the county wherein they operate and have their principal place of business. These authorities are in no sense districts, nor are they political subdivisions, within themselves. They appear to be agencies of the county for which created whose purpose is the "performing of such acts as shall be necessary for the sound planning for, and development of" the counties for which created and established. Although not necessary for determination here, the said development authorities appear to be county agencies and perform a county function. The authority, not being a political subdivision, no answer to your questions 1, 2 and 3, treating such authorities as political subdivisions, appears to be required. Your questions 4 and 5 pose the question of whether a retainer may be deemed a salary if paid monthly, or at other regular periods of time. The supreme court of Alabama, in Agnew v. Walden, 84 Ala. 502, 4 So. 672, text 673, recognized 2 classes of retainers by which the services of attorneys are secured: "First, general retainers. These have for their object the securing beforehand of the services of a particular attorney . . . They have no reference to any particular service, but take in the whole range of possible future contention which may render attorneyship necessary or desirable . . . A special retainer has reference to a particular case, or to a particular service. . ." Questions 4 and 5 pose the question of whether a retainer, evidently referring to a general retainer or retainers, may be deemed a salary if paid monthly or other regular period of time.

It is provided in §122.16, F. S., that "any person who has accepted and is receiving retirement compensation under this chapter shall have such compensation suspended during any period of re-employment in any capacity whatsoever by the state or any political subdivision or any department, branch or agency thereof." County development authorities appear to be agencies of the state or of the county wherein located. State and county officers and employees, as used in Ch. 122, F. S., include all full-time officers who receive compensation for services rendered "from any agency, branch, department, institution or board of the state, or any county of the state . . .; provided, that such compensation in whatever form paid shall be specified in terms of *fixed monthly salaries* by the employing state or county agency and shall not include amounts allowed for professional employees for special or particular service . . ." (Emphasis supplied; §122.02(1), F. S.) "Salary," as used in said Ch. 122, F. S., "means the fixed monthly compensation paid officers or employees, and where officers' or employees' compensation is derived from fees set by statute, salary shall be the total cash remuneration received from such fees. Under no circumstances shall salary include fees paid professional persons for special or particular services." (§122.02(3), F. S.).

Although retired officers and employees of county development authorities would not be prevented from receiving compensation for special professional services rendered for county develop-

ment authorities on a fee or contract basis for services rendered in particular cases, we doubt that they may contract generally with such authorities for the performance of such services that would be in the nature of continuing contracts. We fear that any "retainer" or agreement for the performance of such services, even if the particular services are to be compensated on the basis of an agreement between the parties, where the retainer fee would be payable on a monthly basis or other regular basis, might be deemed a salary within the purview of §122.02(3), unless care is taken in preparing the "retainer contract." The above stated question is answered in the affirmative.

064-34—February 27, 1964

TAXATION

TAX EXEMPTION STATUS OF RECREATIONAL PARKS OWNED, OPERATED AND MAINTAINED BY RELIGIOUS ORGANIZATIONS AND GROUPS—§1, ART. IX, §16, ART. XVI, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Under what circumstances are recreational parks and similar areas owned and operated by religious groups and organizations entitled to exemption from ad valorem taxes?

Numerous decisions by the supreme court of Florida, as well as opinions of this office, hold that for properties to be exempt from ad valorem taxation, the properties claimed to be tax exempt must be held and used exclusively for some one or more of the purposes mentioned in §1, Art. IX, and §16, Art. XVI, of the State Const., unless an exemption on some other basis be provided in the State Const. Said §1, Art. IX, and §16, Art. XVI, of the State Const., limit such exemptions to property held and used exclusively for *religious, scientific, municipal, educational, literary or charitable* purposes. These constitutional provisions have been held to be limitations "upon the power of the legislature to provide for the exemption from taxation of any classes of property except those particularly mentioned classes" mentioned in said constitutional provisions. (*State v. Doss*, 146 Fla. 752, 2 So. 2d 303; *State v. St. John*, 143 Fla. 544, 197 So. 131; *L. Maxcy, Inc. v. Fed. Land Bank*, 111 Fla. 116, 150 So. 248).

"The criterion for exemption from taxation is the character of the use to which the property is put and not the character of the ownership." It is the property and not its owner which is exempt. It is only property that is held and used exclusively for one or more of the purposes mentioned in §1, Art. IX, and §16, Art. XVI, of the State Const., which is exempt from taxation. (*State v. Inter-American Center Authority, Fla.*, 84 So. 2d 9, text 16; *State v. Doss*, 150 Fla. 486, 8 So. 2d 15, text 16; *Lummus v. Fla. Adirondack School*, 123 Fla. 232, text 238; *University Club v. Lanier*, 119 Fla. 146, 161 So. 78, text 79).

It appears from the file before us that a parcel of land in Volusia county, owned and operated by the board of missions of a church organization, is or will be equipped for outdoor recreation and outdoor vesper services, which recreation area is not restricted to members of the church, but is or will be available to the general

public for recreational purposes. The youth of the community will be permitted and will be encouraged to make use of the recreation area for outings, picnics, recreation activities and religious services; church and fraternal organizations may make use of the recreation facilities; transients may use the recreation facilities in a similar manner as state roadside parks are used and, ultimately, when population growth permits, it is planned to organize and establish a church and build a church house on the grounds. We gather from the above and foregoing that clubs of the youth of the community are doubtless planned for the purpose of guiding and assisting such youth to become better citizens and members of religious groups and organizations.

Although it is the *actual use* of the property for one or more of the purposes mentioned in §1, Art. IX, and §16, Art. XVI, of the State Const., that determines the right to tax exemption, we feel that if the above-mentioned *proposed use* of the lands is carried out to a material extent that such use will be within the purview of said constitutional purposes, and the statutes implementing them, then the lands will be entitled to tax exemption. Whether or not there is such a use is largely a question of fact to be determined by the assessor of taxes. Mere ownership of property by a church or religious organization is not sufficient for tax exemption but in addition thereto there must be the required use.

064-35—March 9, 1964

TAXATION

INTANGIBLE PERSONAL PROPERTY TAX LIENS—AUTHORITY TO DISCHARGE WITHOUT PAYMENT—

§§192.04, 192.21, 192.22, 199.15, 199.18, 199.22, 199.23, 733.16, CH. 199, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May the lien of an intangible personal property tax assessment be discharged without payment, and, if so, by whom may the same be discharged?

Intangible personal property, like real and tangible personal property, except class C intangible personal property taxes, is subject to taxation each year as of Jan. 1, and the taxes assessed against such intangible personal property, except said class C intangible personal property, become due and payable on Nov. 1 of the tax year, or as soon thereafter as the intangible personal property tax roll shall come into the hands of the tax collector. (§§192.04 and 199.15, F. S.). Intangible personal property taxes, if not sooner paid, are deemed delinquent on April 1 following their said due date (§199.18, F. S.). Intangible personal property taxes appear to become a first lien superior to all other liens on the property assessed for such taxes as of January 1 of the tax year (§192.21, F. S.) and on other real and personal property as of the date such intangible personal property taxes become due and payable (§192.22, F. S.). Section 199.23, F. S., has been construed as fixing a 7 year limitation on the lien of intangible personal property taxes (*Gay v. Rutherford*, Fla., 73 So. 2d 60, text 61.)

We find no provision in Ch. 199, F. S., relating to intangible personal property taxes, or elsewhere in the Florida Statutes author-

izing or permitting the comptroller, the county taxing officials or any of them, the county judge or any other officer or person to discharge or release intangible personal property taxes or tax liens once they have attached themselves to the property of the taxpayer, or any of such property, prior to the running of the 7 year limitation provided by §§199.22 and 199.23, F. S., or the statutes of nonclaim provided by §733.16, F. S., hereinafter mentioned and discussed. Where intangible personal property taxes and tax liens come within the 7 year limitation above-mentioned, that is, where the intangible personal property taxes have remained unpaid and uncollected for the full period of 7 years from the time they were due and payable, as provided in and by §199.15, F. S., "any interested party may thereafter request that the tax collector cancel the same of record, and it shall be the duty of the tax collector to do so" (§199.22, F. S.) after having obtained the written consent of the comptroller. Cancellation under this provision may be made only when it is clearly evident that the said 7 year statute of limitation has actually run.

Section 733.16, F. S., requires that claims against the estates of decedents, whether due and payable or not, be filed in the office of the county judge, of the county wherein such estate is being administered, within 6 months from the time of the first publication of the notice to creditors as provided in and by said §733.16, F. S. This is 6 months from the first publication of the notice to creditors, not the filing of the last will and testament or the beginning of the administration. These statutes of nonclaim are applicable only where there is an administration of the estate and the publication of a notice to creditors. This statute of nonclaim is applicable to the state, the counties and the municipalities thereof, and their commissions, boards, and other agencies. (*State v. Moore's Estate*, Fla., 153 So. 2d 819; *Re Smith's Estate*, Fla., App., 132 So. 2d 426).

From the above and foregoing it appears that intangible personal property taxes, and the lien securing the payment thereof, may not be discharged or canceled without payment by any officer or person whatsoever, except as provided in §199.22, F. S., as above discussed herein. Only in those cases where the intangible personal property taxes, and the lien thereof, have become barred by the statute of limitation contained in §§199.22 and 199.23, F. S., or where barred by the statutes of nonclaim contained in §733.16, F. S., may intangible personal property taxes be canceled without payment.

Where a person owning intangible personal property having its tax situs in this state dies, and his or her estate is administered in this state, the tax collector, whether the taxes are then due and payable or not, should file a claim for such taxes with the county judge in whose court the said estate is being administered. We remark in passing that this procedure should be followed as to intangible personal property taxes, and also as to real and tangible personal property taxes. Where a taxpayer dies in this state and his estate is being administered in a county of the state, even though taxes have not been levied and assessed for the current year, a claim for such taxes should be filed within 6 months from the first publication of the notice to creditors. It would seem to be advisable that the taxing officials from time to time check the current estate files of the county judge's court and obtain the names of decedents' estates and check the same against their tax records.

064-36—March 9, 1964

CRIMINAL PROCEDURE

SERVICE OF PROCESS OF MUNICIPAL COURT IN ANOTHER CITY IN SAME COUNTY—§168.03, F. S.

To: Mercer P. Spear, City Attorney, Panama City

QUESTION:

May the process of a municipal court be served within the confines of another municipality within the same county under provisions of §168.03, F. S.?

Section 168.03, F. S., provides:

Process of municipal court; by whom executed.—The process of the mayor's court, or other municipal courts, of the cities and towns within the state shall extend to and may be served *anywhere within the territorial limits of the county* in which said city, or town, is located, and all summons, subpoenas, warrants and other process of the mayor's court, or other municipal courts, may be served and executed by the city, or town marshal, his deputies, or other executive officer of such courts, *anywhere within the territorial limits of the county* within which the court issuing the same is located. (Emphasis supplied.)

It would appear that the question which you have presented has not previously come to the attention of the Florida supreme court or this office and thus it is one of first impression here.

Generally legislative intent is the pole star by which we must be guided in construing the acts of the legislature. *Ervin v. Peninsular Telephone Co.*, Fla., 53 So. 2d 647, *Smith v. Ryan*, Fla. 39 So. 2d 281, and *Fla. State Racing Comm. v. McLaughlin*, Fla., 102 So. 2d 574. Where the legislative intent is clearly manifest by the language used, as considered in its ordinary grammatical sense, the rules of statutory construction and interpretation are unnecessary and inapplicable. *Clark v. Kreidt*, 145 Fla. 1, 199 So. 333.

In this instance it appears that it was the intent of the legislature that the process of the municipal court "shall extend to and may be served *anywhere* within the territorial limits of the county." (Emphasis supplied.) Since the language of the statute does not in any way indicate that a person residing in another municipality within the same county should be exempt from process or beyond the reach of the municipal court, it seems only logical to apply the rule that the statute should be given its plain and obvious meaning. See *Maryland Casualty Co. v. Sutherland*, 125 Fla. 282, 169 So. 679 and *Brooks v. Anastasia Mosquito Control District*, Fla., App., 148 So. 2d 64.

Accordingly I am inclined toward the position that the process of a municipal court may under the provisions of §168.03, F. S., be served *anywhere* within the county in which the municipality is located notwithstanding the fact that those sought to be served may be residents of or found within another municipality within the county. Your question as set out above is answered in the affirmative.

064-37—March 10, 1964

ELECTION CODE

ELIGIBILITY OF POLITICAL PARTY CONVENTION DELEGATE SLATE TO CHANGE PREFERENCE AFTER DEADLINE FOR QUALIFYING—§103.101(1), F. S.

To: Tom Adams, Secretary of State, Tallahassee

QUESTION:

Where a national political party convention delegate slate qualifies with the secretary of state expressing a preference for a particular nominee and the name of that preferred nominee is subsequently withdrawn at his request after the last date for filing, may the delegate slate remain on the ballot as an unpledged slate?

Under the provisions of §103.101(1), F. S., delegate slates may be filed during the same period prescribed for filing by state candidates. In the current year these dates were from noon of Feb. 18 through noon of March 3. The preferred nominee of the delegate slate in question, Mr. Richard M. Nixon, requested by wire dated March 4, 1964, that his name be withdrawn and his request was granted by the secretary of state on March 9 under the authority cited in AGO 064-32.

Now that Mr. Nixon's name has been withdrawn subsequent to the last date for filing the delegate slate originally pledged to him has through its organizing chairman acquiesced in Mr. Nixon's withdrawal and requested that the same delegate slate appear on the ballot as an unpledged slate.

Had this request come prior to noon of March 3 when the qualifying time ended there would have been no question as to the delegates' authority to change from a pledged to an unpledged slate. Now that the final qualifying deadline has passed there does, however, appear to be serious doubt as to the propriety of allowing the delegates to change their status.

There is no question that the delegates are themselves the candidates and under the two previous opinions of this office, AGO 053-333, p. 87 of the 1953-54 biennial report, and AGO 055-345, p. 448 of the 1955-56 biennial report, have been held to the same standards as other candidates with regard to compliance with the campaign contribution and expenditure law.

In AGO 052-106, p. 124 of the 1951-52 biennial report, this office held a candidate improperly qualified and ineligible to seek office where he filed the proper fees and papers for a seat in the state house of representatives and merely failed to designate the proper group prior to the deadline for qualifying.

In *State ex rel Taylor v. Gray*, 157 Fla. 229, 25 So. 2d 492, a prospective candidate filed the proper papers but through an error in calculation on the part of the clerk in the secretary of state's office, said prospective candidate tendered, what was discovered after the deadline for qualifying, as an inadequate filing fee.

In that case the court held that the error could not be corrected by tendering the proper amount after the deadline for qualifying even though the remaining papers were in order.

Attention is also directed to *State ex rel Vining v. Gray*, 154 Fla. 255, 17 So. 2d 228, and *State ex rel Norman Bie v. Gray*,

Case No. 29333 (not reported) wherein the Florida supreme court held that qualification papers could not be filed after the deadline for qualifying.

On the basis of the authorities cited herein it would appear that once the deadline for filing has passed no further alterations or changes can be made in a candidate's qualification papers. Accordingly, where the preferred nominee of a particular delegate slate has been withdrawn, there is no precedent which would permit said delegates to change their preference and alter their petition to become an unpledged slate following the deadline for filing. This being the case it appears that the proper action now is to remove the delegate slate from the ballot since the name of the person to whom they are pledged will not appear on the ballot. Your question as set out above is answered in the negative.

064-38—March 11, 1964

REGULATION OF TRADE AND COMMERCE

NEGOTIATION OF MORTGAGE LOANS BY HOME IMPROVEMENT CONTRACTORS—LICENSING REQUIREMENT— CH. 494; §494.02(3), F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a home improvement or remodeling contractor enters into a contract for the performance of improvements to realty at a stated price to the owner of the property and in conjunction with said improvement contract agrees to lend to the owner or advance to the owner's nominee a sum of money, both such indebtedness being secured by a mortgage on realty, is such contractor required to be licensed under the provisions of the mortgage brokerage act, Ch. 494, F. S.?

The facts submitted in the cited question appear to be reflective of a common method of obtaining business by persons engaged in the home improvement or remodeling business in this state. The plan is frequently advertised in newspapers as a "consolidation loan" plan. Under the practice which appears to prevail, the remodeler or home improver holds out the said consolidation loan plan as an inducement to his customers to permit the given contractor to perform the home improvements or remodeling job. It further appears that no specific fee is exacted from the customer on account of the sums loaned or advanced other than lawful interest rates as provided by statute.

The question as to the requirement that the contractor comply with the licensing and other provisions of Ch. 494, F. S., seems to rise from the last mentioned circumstance in the foregoing paragraph, that is, absence of specific compensation or gain in connection with the loan or advance made to the customer as is contemplated in the definition of a mortgage broker contained in §494.02(3), F. S., which reads as follows:

... any person not exempt under §494.03 who for compensation or gain, or in the expectation of compensation or gain, either directly or indirectly makes, negotiates, acquires or sells, or offers to make, negotiate, acquire or sell a mortgage loan. . . .

Inspection of the last cited statutory provision relating to compensation and gain in light of the manner in which the contractor presents his sales appeal to the prospective customer whereunder which sales appeal the customer is required to enter into the remodeling or improvement contract as a condition precedent to the obtaining of a loan or advance of moneys to his nominee, it seems manifest that the contractor does receive compensation or gain in connection with the loan or advance which he negotiates, such compensation or gain consisting of the customer entering into the home improvement or remodeling contract.

In view of the statutory definition of a mortgage broker as contained in §494.02(3) set out above, it would appear that the above question is answered in the affirmative.

064-39—March 11, 1964

ELECTION CODE

RESIDENCE, DOMICILE AND CITIZENSHIP IN FLORIDA—
REGISTERING TO VOTE—§§97.041, 97.063, 222.17(2), F. S.;
§7, ART. X, §1, ART. VI, STATE CONST.

To: *Farris Bryant, Governor, Tallahassee*

QUESTIONS:

1. May a person presently living outside the state of Florida become a resident and citizen of this state?

2. May a person serving in the armed forces and stationed outside the state of Florida register to vote in the primary and general elections held in this state?

It appears from the facts of the letter forwarded to us from you that an officer serving in the armed forces is presently stationed in the state of Alabama, that while he was born in the state of Maryland he moved with his parents from that state at an early age and later lived with his parents in Florida and attended Bay county public schools. This officer left the state to attend the U. S. military academy at West Point, N. Y., and from there presumably into the military service and he wishes to return to Florida upon his retirement from the army.

The question often arises in this state, in many connections, as to how and when one, moving from another state into Florida, becomes a resident and citizen of Florida. In recent years numerous persons have moved to Florida and settled therein with the intention of making this state their permanent home.

Three types of domicile in this country have been recognized, namely, domicile of origin, which is the place of birth; domicile voluntarily acquired, which is often referred to as domicile by choice, and domicile arising from relation, such as that arising from marriage. (*Wade v. Wade*, 93 Fla. 1004, 113 So. 374, text 375). The 14th amendment in the U. S. Const., declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." (Emphasis supplied.) When determining the domicile and residence of a citizen of the U. S. the state wherein he resides is of importance. "Generally, everyone has a domicile somewhere and such domicile continues until a new domicile is acquired. The two essential elements to the acquisition of a new domicile, or domicile by choice as distinguished from domi-

cile of origin, are (1) residence in a new locality, (2) coupled with an intention to make it one's home, that is to say, an intention to permanently remain there and not to return to the old locality" (11 Fla. Jur. 10, §11; *Warren v. Warren*, 73 Fla. 764, 75 So. 35, text 40). "The mere intention to acquire a new domicile, unaccompanied by an actual removal, avails nothing; neither does the fact of removal avail without the intention." (*Wade v. Wade*, 93 Fla. 1004, 113 So. 374, text 375.) Where a good-faith intention is coupled with an actual removal evidenced by positive overt acts, then the change of residence and domicile is accomplished and becomes effective (11 Fla. Jur. 10, §11; *Bloomfield v. St. Petersburg Beach*, Fla., 82 So. 2d 364, text 368).

If a man actually becomes a bona fide resident of a state and intends to remain permanently a citizen of that state, mere absence with the specific clear-cut bona fide intention of returning will not destroy the residence actually theretofore established. (*Bloomfield v. St. Petersburg Beach*, *supra*, text 369) The establishment of purpose and intent in connection with the acquisition of a legal residence or domicile will usually depend on a variety of acts, declarations and facts, all of which must be weighed as we would weigh evidence upon any other subject (*Wade v. Wade*, *supra*). In short, residence and domicile in this state, as to persons moving into this state, is largely a matter of purpose and intention, which is to be determined from one's acts, declarations and other facts, coupled with one's permanent location in this state. There is no fixed period of time, either by the constitution or by statute, one must reside in Florida prior to becoming a citizen and resident of the state, so long as he is a citizen of the U. S.

However, for a person to become an elector entitled to vote in Florida, he must not only have become a citizen and resident of the state domiciled therein but must have, under §1, Art. VI, of the State Const., "resided in and had his habitation, domicile, home and place of permanent abode in Florida for one year and in the county six months." The requirements for qualification of electors in municipal elections are controlled by statute and legislative charters, which may vary from municipality to municipality. Section 7, Art. X, of the State Const., allows homestead tax exemption, to those owners of homes in this state "who reside therein and in good faith make the same his or her permanent home." This was, in *Sparkman v. State*, Fla., 58 So. 2d 431, held not to require residence in the state for 1 year and in the county for 6 months.

The courts of this state have established the rule that a person in the military service of the U. S. coming into this state under military orders and remaining in this state under such orders will not, of his presence in the state alone, become a citizen or resident of the state, domiciled therein. However, the fact that a person may be under military orders will not prevent him from becoming a citizen domiciled in Florida, where the facts and circumstances are such as will overcome the presumption above-mentioned (11 Fla. Jur. 20, §25; *Campbell v. Campbell*, Fla. 57 So. 2d 34). Where a person of another state, including military personnel, comes into this state and by clear and positive evidence establishes his permanent domicile in this state, there arises a presumption that such permanent domicile remains in this state until legally established elsewhere. A citizen of this state, although away from the state for a long period of time, for example, in foreign military or gov-

ernmental service, does not surrender his Florida citizenship because of absence from the state alone.

Many members of the military services brought into Florida under military orders while serving in this state decided to move their citizenship, and that of their families, to Florida, evidencing that intention by purchasing homes in this state, registering to vote and actually voting in one or more elections, and establishing their families in the homes purchased by them as their permanent home, thereby clearly evidencing an intention to make Florida their place of domicile. The fact that military orders keep them and their families beyond the borders of Florida is not within itself sufficient to destroy their Florida domicile and citizenship, and this seems to be true, although they dispose of their homes in this state. However, this presumption of continuing domicile and citizenship may be overcome by evidence clearly showing the actual establishment of domicile and citizenship in another state.

In this connection, it may be well to state that homestead tax exemption requires, under §7, Art. X, of the State Const., that one maintain his permanent residence in that home. Permanent and continued residence in a state is not required for domicile and citizenship.

Section 222.17(2), F. S., provides as follows:

Any person who shall have established a domicile in the State of Florida, but who shall maintain another place or places of abode in some other state or states, may manifest and evidence his domicile in this state by filing in the office of the clerk of the circuit court for the county in which he resides, a sworn statement that his place of abode in Florida constitutes his predominant and principal home, and that he intends to continue it permanently as such.

Pertaining to your question as to whether a member of the armed forces stationed outside the state of Florida may register to vote, §97.041, F. S., sets forth the qualifications for registering to vote and, in short, said section requires that a person must be 21 years of age, "a citizen of the United States, a permanent resident living in Florida for one year, residing in the county in which he wishes to register for six months."

However, whether in fact one has been a resident of the state of Florida and of the county in which he may wish to register is a matter of fact which must be determined in the first instance by the supervisor of registration of the county in which one may wish to register.

Section 97.063, F. S., makes provision for those persons who may have become qualified to register, as set out above, but became members of the armed forces prior to actually registering, said provision states as follows:

Members of the armed forces while in the active service, and their spouses, shall be entitled to register absentee.

064-40—March 12, 1964

COUNTY SCHOOL SYSTEM

COUNTY SUPERINTENDENT OF PUBLIC INSTRUCTION— BUDGETING AND ADMINISTERING UNBUDGETED INTERNAL FUNDS—§237.02(9), F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee*

QUESTION:

Under provisions of §237.02(9), F. S., and §130-8.26 (7), state board of education regulations, does the county board of public instruction have the authority in the administering of unbudgeted internal funds in a junior college to determine and to designate the purposes for which incidental funds not collected from students nor held in trust for a specific purpose shall be used?

Section 237.02(9), F. S., provides:

INTERNAL FUNDS.—The county board shall be responsible for the administration and control of *all local school funds derived by any school, including junior colleges, from all activities including the school lunch program, or any other source*, and shall prescribe the principles and procedures to be followed in administering these funds consistent with regulations adopted by the state board of education.

The state board of education shall adopt regulations governing the procedures for the handling of the receipt, expenditures, deposit and disbursement of internal funds, which regulations do not necessarily have to comply with the requirements set forth in §237.02(1)-(8). (Emphasis supplied.)

In accord with the above statutory provision, your question is answered in the affirmative.

064-41—March 13, 1964

TAXATION

TAX OBLIGATIONS ON TRANSFER OF INTEREST IN COOPERATIVE APARTMENTS—§§201.02, 608.03(1)(b); CH. 201, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What taxes, excise or otherwise, are due upon a transfer of a share of stock and an interest in a cooperative apartment?

Your file handed us with your request for opinion reveals transactions concerning some 18 apartments in the Boca Ciega Apartments, Unit No. 1, located at 1834 Shore Drive South in St. Petersburg, Fla. We gather from the file before us that the apartments were originally owned by Pasadena Plaza, Inc., a corporation, which apartments were sold and transferred by their said owner to Boca Ciega Apartments, Inc., Unit No. 1, a Fla. corporation, around the year 1958, for a consideration of around \$215,000, on

which documentary stamp taxes were paid under §201.02, F. S., in the sum of \$430.

Boca Ciega Apartments, Inc., Unit No. 1, was incorporated under Ch. 608, F. S., around Sept. 17, 1958, and was dissolved, evidently for nonpayment of capital stock taxes, on May 24, 1963. One of the powers of the said corporation, as set out in its corporate charter, is to "operate, manage and conduct the apartment house thereon under a cooperative ownership plan whereof the entire stock of the corporation shall be held by the stockholders thereof in proportion to the number of apartments occupied or to be occupied by them in such apartment house building . . ." Under the said charter the corporation was authorized to issue 18 shares of corporate stock without nominal or par value, such number of shares of stock corresponding in number with the number of apartments in the apartment building. Under its charter the corporation has perpetual existence, is governed by 3 directors, and had 3 incorporators. We note in passing that §608.03(1)(b), F. S., provides that "cooperative associations shall have not less than ten incorporators." This requirement for 10 incorporators for cooperative associations appears to have originated with Ch. 7384, 1917.

The supreme court, appellate division, 1st Dept., of N. Y., in *Payson v. Caputa*, 9 A. D. 226, 193 N. Y. S. 166, text 170, stated that "the word 'cooperative,' although of ancient usage and well-known to the law, has variable meaning which is quite flexible, depending upon the context in which it is used. (18 C. J. S. 127; Cooperative Corporations Law, section 3, subsection (c); General Corporation Law, section 9)." "Cooperative. Acting together to accomplish the same end, helping, promoting the same end." A "cooperative" is a corporation organized for purpose of rendering economic services, without gain to itself, to shareholders or members who own and control it." "Cooperation" has been defined as the act of operating or acting together, or jointly with another or others (*Costa v. Cox*, Ohio App., 171 N. E. 2d 529, text 535; *Edwards v. Hardwick*, Okla. 350 P. 2d 495, text 502; *Christman v. Reicholdt*, Mo. App. 150 S. W. 2d 527, text 532). In *United Grocers, Limited v. U. S. D. C. Cal.*, 186 Fed. Supp. 724, text 733, a cooperative was referred to as a corporation organized for the purpose of rendering economic services without gain or profit to itself, or to the stockholders or members who own and control it. Cooperative associations or corporations have been said to be neither corporations, in the ordinary business sense, nor partnerships (*Kuhns v. Horn*, 223 Nev. 547, 355 P. 2d 249, text 253). It is usually the obligation of a cooperative corporation or association to maintain and operate its property on a mutual and cooperative basis for the sole use of its stockholders or members without profit, gain, remuneration or rent to itself, excepting the assessments provided for necessary administration, upkeep, taxes, operation, etc., of the corporate or association property. Cooperative associations and corporations holding, administering, operating and caring for cooperative apartment buildings, hold their said property for the use and benefit of their stockholders and proprietary lessees, and not otherwise. Each membership certificate or certificate of stock and the apartment assigned thereto and under proprietary lease to the member or stockholder are appurtenant one to the other, and neither may be transferred separate and without the other. Such share of stock or membership certificate and the apartment

assigned thereto have no separate value, and must be jointly and not severally sold and transferred. They have no value except jointly and together and must be sold and transferred together, under the usual cooperative agreement or bylaws. The unanimous consent of all stockholders or members under a cooperative apartment agreement or corporation is usually required to change an existing agreement, contract or bylaws regulating the same.

We have before us a copy of that certain "Bill of Sale and Deed," bearing date of Nov. 15, 1962, from Charles F. Ewing and wife to Hugh White, whereby "Apartment '4' in that certain cooperative apartment building known as Boca Ciega Apartments #1, situate at 1834 Shore Drive South, St. Petersburg, Fla.," was granted, bargained, sold, transferred and delivered to the said grantee, (party of the second part) his executors, administrators and assigns, "to have and to hold the same unto the said party of the second part, his executors, administrators and assigns, forever." In addition to describing said Apartment #4, there is also described and included "all fixtures therein contained, and the unobstructed use of all common passageways in said apartment building together with all adjoining land known and described as Lot 4, Pasadena Plaza, as per plat thereof . . . limited only by the Charter, By-laws and official actions" of the said Boca Ciega Apartments, Unit #1, Inc. This bill of sale and deed further provide that the grantor "will warrant and defend the sale of the said property hereby made unto the said party of the second part, his executors, and assigns, against the lawful claims and demands of all persons whomsoever."

Although other documents relative to the transaction have not been furnished us, such as the agreement between the stockholders or members of the association, corporate bylaws, etc., it is evident that the stockholder or member of the cooperative association or corporation has the exclusive right of use and occupancy of the apartment assigned to his share of stock or membership certificate, and the use of the common properties of the apartment and lands upon which the apartment building is located. As to the rights and interests of parties to a cooperative apartment proprietary lease, bylaws, articles of incorporation, and other documents, we have made free use of the cooperative apartment forms in 8 Am. Jur. Legal Forms, pp. 177 to 233, inclusive. The stockholder-tenant would seem to have a proprietary leasehold interest in the apartment assigned to his stock or membership interest, and in the common properties of the apartment house and lands upon which located. The copy of the bill of sale and deed, above-mentioned and quoted from, clearly indicates a perpetual right of occupancy of the apartment assigned to a stock or membership interest and use of the common properties, although the fee title to the apartment building and the lands upon which located appears to be vested in Boca Ciega Apartments, Inc., Unit No. 1, a Fla. corporation, the lessee or grantees of the apartment and common properties described in the bill of sale and deed aforesaid.

Section 201.02, F. S., imposes a documentary stamp tax on "deeds, instruments or writings, whereby any lands, tenements or other realty, or any interest therein, shall be granted, assigned, transferred or otherwise conveyed to or vested in the purchaser, or any other person by his direction . . ." (Emphasis supplied.) This quoted language has remained unchanged since the adoption of F. S., 1941, although the rate of the tax imposed has been

changed once or twice. The federal documentary stamp tax is imposed on deeds, instruments or writings "whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred . . ." (Emphasis supplied.) The federal statute contains the word "sold" not contained in the Florida Statute. (§4361, title 26, U. S. code). The Florida statute contains the phrase "or any interest therein" not contained in the federal statute. This brings us to the question of whether or not a leasehold interest in real property is an interest in lands, tenements or realty within the purview and intent of §201.02, F. S.

The supreme court of Fla., in *Baxter v. Thompson*, 134 Fla. 494, 184 So. 118, text 121, stated that "it has been held by this court that a sale of standing timber is a contract concerning an interest in land within the meaning of the statutes of frauds." In *Flowers v. Atlantic Coast Line Railway Co.*, 140 Fla. 805, 192 So. 321, text 323, the same court, citing *Campbell v. McLaurin Investment Co.*, 74 Fla. 501, 77 So. 277, held that "a valid lease of land for a term of years is a conveyance of an interest in land" within the statute of frauds. However, it was held in *DeVore v. Lee*, 158 Fla. 608, 30 So. 2d 924, text 926, that such term of years in the hands of the lessee and his assigns is classified, at common law, as "chattels real and classified as personal property." In *DeVore v. Gay*, Fla., 39 So. 2d 796, the court remarked that "this court has already determined in this case, *DeVore v. Lee*, supra, that leases as a class come within the terms of §201.02, F. S., 1941, F. S. A., and said section levies a documentary stamp tax measured by the consideration" paid or obligated. However, the court further held that where the payments for the occupancy are made monthly during the life of the lease that nothing is due at the time of the making and execution of the lease but accrues monthly as the premises are occupied so that no tax is due at the time of making of the lease. See also *Dundee Corp. v. Lee*, 156, Fla. 699, 24 So. 2d 234, and *DeVore v. Lee*, supra. In the last mentioned case the court remarked that "a lease has been defined as 'a conveyance by the owner of an estate to another of a portion of his interest therein for a term less than his own' and 'it passes a present interest in the land for the period specified.'"

Leaseholds have been held to be an interest in land in *Owens v. Hughes*, 188 Wis. 215, 205 N. W. 812; *Jensen v. Nolte*, 233 Iowa 636, 10 N. W. 2d 47; *State Sav. and Loan Assoc. v. Bryant*, 159 Or. 601, 81 P. 2d. 116, text 128; *Oahu Railway and Land Co. v. Ewa Plantation Co.* 15 Haw. 318; *First Trust & Deposit Co. v. Syrdelco, Inc.*, 292 N. Y. S. 206, text 207; *Moeller v. Gormley*, 44 Wash. 465, 87 P. 507, text 508; *Taylor v. Marshall*, 255 Ill. 545, 99 N. E. 638, text 639; *Chicago Attachment Co. v. Davis Sewing Mach. Co.*, 142 Ill. 171, 31 N. E. 438, text 440 and 441; *Judd v. Landin*, 211 Minn. 465, 1 NW 2d 861, text 865; *Greene Line Terminal Company v. Martin*, 122 W. Va. 483, 10 S. E. 2d 901, text 906; *Milliken v. Faulk*, 111 Ala. 658, 20 So. 594, text 595. See also 3 *Thompson on Real Property*, 1959 Replacement, 6, §1016, referring to "the dual nature of a leasehold being an interest in land and at the same time a chattel." In *Rogers v. Martin*, 87 Fla. 204, 99 So. 551, text 552, the court referred to lessee's interest in realty as being "equivalent to absolute ownership" during the life of the lease.

An easement has been said to be a right or privilege in one person's estate granted to another for his advantage or convenience,

and is property in the nature of land. It is an interest in the land of the servient tenement, and may be a freehold or a chattel interest according to its duration (28 C. J. S. 619-624, §1). An Annotation in 13 L. R. A. 158 and 159 collects several state court decisions which seem to hold that a sale or lease of a particular room above the first story of a building in perpetuity conveys an easement in real property. An easement implies an interest in land (*Burdine v. Sewell*, 92 Fla. 375, 109 So. 648, text 652; *Winthrop v. Wadsworth*, Fla., 42 So. 2d 541, text 543). See also 14 Words and Phrases, Perm. Ed., pp. 67, 68 and 69.

Due to the fact that the shares of stock in the average cooperative apartment corporation, and the proprietary lease from the cooperative to the stockholder-lessee, or the member-lessee, are inseparable and must be transferred or assigned together and not separately, the shares of stock and the apartment assigned to it, and its proprietary lease, must be considered as a unit for the purpose of taxation under Ch. 201, F. S. The proprietary lease of an apartment and the common properties used in connection therewith in law convey an interest in "lands, tenements or other realty," within the purview of §201.02, F. S., and is subject to taxation thereunder, the same taxable on the consideration paid for the said stock and proprietary lease.

064-42—March 18, 1964

GAMBLING

ADVERTISING, MATCHBOOK—NUMBERS SCHEME—AS CONSTITUTING A LOTTERY

To: *Don Genung, Sheriff, St. Petersburg*

QUESTION:

Does the following scheme constitute a lottery in violation of the laws of this state?

STATEMENT OF FACT:

A local advertising company distributes matchbook covers which contain a number on the inside of each cover. Periodically winning numbers are selected and broadcast over local radio stations in the Tampa Bay Area. The winning number can be redeemed by the holder for either money or merchandise at any participating store.

A subsequent telephone conversation on Feb. 20, 1964, with your office discloses that the matchbooks are available only in the participating stores, and that the advertising company is in the employment of the participating stores.

A lottery is a scheme consisting of 3 elements, i.e., prize, award by chance, and consideration. The element of prize arises when the winning number is redeemed with merchandise or money. The element of chance is likewise evident in the contest, being furnished by the random selection of a winning number. Such selection is one which is beyond the control of the contestant.

AGO 060-76 holds that where a contestant is required to attend the sponsor's place of business in order to pick up entry blanks, such requirement constitutes consideration to a sufficient extent to cause the contest to be a lottery, providing the other elements of prize and chance are likewise present. Such rationale is

applicable to the proposed matchbook contest because the matchbooks, which are legally comparable to the entry blanks discussed in 060-76, are available only at the participating stores; therefore, the contestant is required to attend such stores in order to engage in the contest. The value to the participating merchant in having the contestant thus directly exposed to his products would constitute consideration. Further consideration is found in the necessary expenditure of time and expense on the part of the contestant in making a trip to the participating merchant's store in order to pick up the matchbooks. Such consideration is given *not* for the prize, but for the *chance* to win. Therefore, since the contest is one in which *consideration* is given by the contestant for a *chance* to win a *prize*, those 3 elements which have been held to constitute a lottery are present, and the contest would violate the lottery laws of this state.

064-43—March 18, 1964

CHILDREN

PROHIBITION AGAINST PUBLICATION OF NAME AND OTHER INFORMATION OF CHILD DETAINED IN CUSTODY ACCUSED OF COMMITTING A FELONY—CONFIDENTIALITY OF RECORDS—§§39.01, 39.02, 39.03, 39.09, 39.12(3); CH. 39, F. S.

To: Norton Josephson, Municipal Judge, Daytona Beach
QUESTION:

Where a law enforcement officer of a municipal police department takes into custody a minor, accused of committing a felony, is said police department authorized to furnish to a daily newspaper, the name and address of the alleged minor offender and to allow a news reporter of said newspaper to examine the records of the police department pertaining to said minor and the alleged offense?

The answer to your question must be arrived at by a consideration of the pertinent provisions of Ch. 39, F. S., relating to juvenile courts.

Said chapter has no concern with anyone except a "child," which word is defined by §39.01(6), F. S., as follows:

(6) "Child" means any married or unmarried person under the age of seventeen years, or any person who is charged with a violation of law occurring prior to the time that person reached the age of seventeen years.

Your question refers to a "minor." I know of no provision of law which would stand in the way of an affirmative answer insofar as it concerns a minor who is not a "child" within the foregoing definition. Therefore, what is hereinafter said will relate only to a child who comes within said statutory definition.

A child who commits a violation of law is a "delinquent child" (§39.01(11), F. S.). The juvenile court has exclusive original jurisdiction of delinquent children domiciled, living in or found within the county in which the court is established (§39.02(1), F. S.). In certain prescribed instances, the juvenile court may transfer a child to a court having criminal trial jurisdiction, for trial on a criminal charge (§39.02(6), F. S.).

The person taking and detaining a child in custody is required to deliver the child, without delay, to the juvenile court or, *if the judge has so ordered*, to a detention home or licensed child-caring institution or county or city jail (§39.03(3), F. S.).

Section 39.03(6), F. S., provides that:

(6) No child taken into custody shall be fingerprinted or photographed except by special order of the juvenile court judge, and no original nor any copy of any so taken shall be filed or recorded in any place other than the juvenile court, but all originals and copies thereof shall be delivered over to the juvenile court at the time directed in the order and promptly destroyed; provided, that this shall not apply to the photographing of children at an industrial school. *Any record of the child made by any law enforcement officer or other person except the officers and employees of the juvenile court shall be made in a separate record kept for that purpose, identifying the child only by the initials and juvenile court case number of the child; shall not be a public record; and shall not be open to inspection by anyone other than the officers and employees of the juvenile court and by the child, the parents or legal custodians of the child, and their attorneys; provided, however, that the records of child traffic violations shall be kept in the full name of the violator and shall be open to inspection and publication in the same manner as adult traffic violations. (Emphasis supplied.)*

Section 39.12(3), F. S., relating to the secrecy of juvenile court records, reads as follows:

(3) Juvenile court records except records of traffic violations, shall not be open to inspection by the public. All records, except those for traffic violations, shall be inspected only upon order of the judge, by persons deemed by the judge to have a proper interest therein, except that a child and the parents or legal custodians of the child and their attorneys shall always have the right to inspect and copy any official record pertaining to the child. The judge may permit authorized representatives of recognized organizations compiling statistics for proper purposes to inspect and make abstracts from official records, under whatever conditions upon their use and disposition the judge may deem proper, and may punish by contempt proceedings any violation of those conditions.

Section 39.09(2), F. S., relating to hearings by juvenile courts, provides that:

(2) Hearings shall be conducted by the judge without a jury, applying the rules of evidence in use in equity cases in the circuit courts, and adjourning the hearings from time to time as necessary. All such hearings, except as hereinafter provided, shall be open to the public and no person shall be excluded therefrom *except on special order of the judge, who, in his discretion may close any hearing to the public when the public interest or the welfare of the child, in his opinion, is best served by so doing.* In any event, all hearings involving unwed mothers, custody or placement of illegitimate children shall remain confidential and closed to the public as heretofore. Hearings in such cases involving more than one child may be

held simultaneously where the several children involved are related to each other or were involved in the same transactions. The child and the parents or legal custodians of the child may be examined separately and apart from each other. This subsection shall not be applicable to hearings before the judge as committing magistrate. (Emphasis supplied.)

In the light of the foregoing statutory provisions, it is my opinion that a municipal law enforcement officer taking into custody a "child" accused of committing a felony is *not* authorized to allow a news reporter to examine the records of the police department pertaining to such child and the offense allegedly committed by such child.

I find no statutory provision which, in so many words, prohibits such a police officer from furnishing to a newspaper the name and address of such a child but in the light of all of the precautions which the legislature has taken to insure that the identity of such a child should be kept confidential (unless and until the juvenile court holds an open hearing at which such identity is made public), I think that it would be improper for such a police officer to furnish the name and address of such a child to a newspaper.

It is true that the above-quoted §39.09(2) requires that all hearings by a juvenile court be open to the public except when the judge closes the hearing to the public by special order whenever in his opinion the public interest or the welfare of the child is best served by so doing (and in certain other situations not here pertinent). Of course, if the hearing is open to the public, the identity of the child is revealed at the hearing. However, a police officer has no way of knowing in advance whether the juvenile judge will make a special order closing a hearing to the public, and therefore such an officer should not permit a news reporter to examine police department records concerning a child charged with a felony or reveal the identity of the child to a newspaper unless and until the juvenile judge conducts a public hearing.

Committee Substitute for HB154 was enacted into law by the 1951 legislature and, as amended by subsequent legislatures, is now Ch. 39, F. S. The following provision in HB154 was omitted from said committee substitute, to wit:

Neither the name, picture, nor address of any child within the jurisdiction of the juvenile court shall be made public by any newspaper, magazine, book, radio or television station, in connection with the proceedings before the juvenile court, unless authorized by order of the juvenile court. This subsection shall not be applicable to any notice issued by the court containing the name of a child, published in a newspaper as prescribed by this chapter.

The said quoted provision of said HB154 which, as above-stated, was eliminated from the committee substitute that became law, had nothing to do with the duties and responsibilities of police officers; it related only to newspapers, magazines, books, radio and television. In view of the provisions of Ch. 39 which are referred to above, it is my opinion that the elimination of the last-quoted provision of said HB154 from said committee substitute did not leave a police officer free to furnish a newspaper the name and address of a child taken into custody on a charge of having committed a felony or to permit a newspaper reporter to

inspect police department records pertaining to such child and the offense charged against him.

064-44—March 18, 1964

MOTOR VEHICLES

DRIVERS' LICENSES AND MOTOR VEHICLE TAGS—NON-RESIDENTS—§§322.03(1), 322.04(3), (5), 320.02, 320.08, 320.37, 320.38, F. S.

To: O. P. Johnson, County Judge, Kissimmee

QUESTION:

Is a nonresident employed in another state but in the state of Florida for short periods of time, engaged in the same type of employment for his employer, required to obtain a Florida driver's license or a Florida motor vehicle license for his automobile while driving said automobile over the highways of this state?

Section 322.03(1), F. S., states in part:

(a) No person, except those hereinafter expressly exempted, shall drive any motor vehicle upon a highway in this state unless such person has a valid license as an operator or chauffeur under the provisions of this chapter.

Section 322.04, F. S., states in part the following:

322.04 *Persons exempt.*—The following persons are exempt from obtaining a driver's license:

(3) A nonresident who is at least sixteen years of age and who has in his immediate possession a valid operator's license issued to him in his home state or country, may operate a motor vehicle in this state only as an operator.

It should be noted however that there is contained in §322.04(5) a proviso to the above-quoted exemption which states:

(5) The provisions of this section shall not apply to any nonresident *who shall accept employment*, or shall enter his children to be educated in the public schools of the state, or a child of such nonresident who is at least sixteen years of age, *but in such case or cases such nonresident or child of the nonresident shall be required to obtain a driver's license* in the same manner as is required of residents of the state before such nonresidents or children shall be permitted to operate any motor vehicle on the highways of the state. (Emphasis supplied.)

Thus it appears that a nonresident who enters his children in the public schools of Florida is required to obtain a Florida driver's license, as are any children of any such nonresident who are at least 16 years of age. Likewise, if a nonresident "accepts employment" in this state, he is required to obtain a Florida driver's license. Whether such a nonresident has accepted employment in the state is a matter of fact to be determined in each case. However, it would appear that if the situs of his employment is in another state and he is only within the state of Florida for reasonably short periods of time for the purpose of performing duties under an already existing employment relationship entered into and subsisting outside this state, he has not "accepted employment" within the meaning of the statutes and would therefore not be required to obtain a Florida driver's license.

As to the question of license tags and registrations for such a nonresident's auto, §320.02, F. S., and §320.08 require license tags and registrations for vehicles driven on the highways of this state or maintained in this state. The same basic exception made for drivers' licenses is likewise made for vehicle license tags in §320.37, F. S., which provides:

The provisions of this chapter relative to registration and display of license number plates shall not apply to a motor vehicle owned by a nonresident of this state, other than a foreign corporation doing business in this state; provided, that the owner thereof shall have complied with the provisions of the law of the foreign country, state, territory or federal district of his residence, relative to motor vehicles and the operation thereof, and shall conspicuously display his registration number as required thereby; but such exemption shall not apply to motor vehicles operated for hire.

and §320.38, F. S., which provides the following:

The provisions of law authorizing the operation of motor vehicles over the highways of the state by nonresidents of this state, when such vehicles shall be duly registered or licensed under the laws of some other state or foreign country, shall not apply to any nonresident *who shall accept employment, or engage in any trade, profession or occupation in this state*. In every case where a nonresident shall accept employment, or engage in any trade, profession or occupation in the state, *or shall enter his children to be educated in the public schools of the state*, such nonresident shall be required to register his motor vehicles in this state, if such motor vehicles are proposed to be operated on the highways of the state. (Emphasis supplied.)

Here again, if the nonresident shall enter his children in the public schools of Florida, he is required to obtain a motor vehicle license tag. He is also required to obtain such a tag if he shall accept employment in the state. This again is a matter of fact to be determined under the same criteria discussed with reference to drivers' licenses.

While there is no way of fixing a definite time period which would govern every situation, it would appear that if you determine that 60 days would constitute a reasonable period to remain in the state as to a given individual or group of individuals, such determination would not seem to be unreasonable since the nature of the employment rather than the length of the employment would be the determining factor.

The foregoing discussion is limited to ordinary drivers' licenses and, of course, does not purport to embody the question as it may relate to chauffeurs' licenses requirements under the statutes.

I trust the above comments and citations will be of assistance to you.

064-45—March 24, 1964

MECHANICS' LIENS

NOT OBTAINABLE AGAINST PROPERTY OF COUNTY
BOARD OF PUBLIC INSTRUCTION—§§84.011(14),
235.32, 255.05, F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee*

QUESTIONS:

1. Can a contractor, sub-contractor, or materials supplier file a lien against property owned by a county school board? If so, can he collect on such a lien?

2. If a contractor, sub-contractor or materials supplier cannot file a lien on such property, does the law require that a release of liens be obtained on school construction projects?

3. What is the school board's position on making payments to the prime contractor if the specifications for the project require a release of liens from the prime contractor and he refuses to supply the releases?

In *City of St. Augustine v. Brooks*, 55 So. 2d 96, the supreme court of Fla. stated:

In *Special Tax School District No. 1 v. Smith*, 61 Fla. 782, 84 So. 376, this court approved the prevailing rule in this country to the effect that in the absence of a statute expressly providing for it, a mechanic's lien will not attach to and cannot be enforced against property held for public school purposes. In *Am. Jur. 36*, page 27, after treating the subject, many cases are cited approving the general rule on the subject. There are some exceptions but they are generally supported by statute or the contract under which the trust was acquired.

In §84.011(14), F. S., (mechanics' lien law of Florida), real property is defined as follows:

Real property means the land that is improved and the improvements thereon, including fixtures, *except any such property owned by the state, county, any municipality, school board, or governmental agency, commission or political subdivision.* (Emphasis supplied.)

In accord with the above, question 1 is answered in the negative.

I believe questions 2 and 3 are answered by §235.32, F. S., which provides, in part:

The contractor shall furnish the county board with a performance bond, issued by a surety company licensed to do business in Florida, for one hundred per cent of the contract price. The contractor shall also furnish a payment bond in accordance with §255.05 as a guaranty against the involvement of the county board in actions to obtain payment for materials, supplies or labor used directly or indirectly by contractor or subcontractors. Any and all persons, firms or corporations who shall construct any part of any school building or addition thereto on the basis of any unapproved plans or in violation of any plans approved in accordance with the provisions of this chapter and regulations of the state board relating to school building stand-

ards or specifications shall be subject to forfeiture of his bond and unpaid compensation in an amount sufficient to reimburse the county board for any costs which will need to be incurred in making any changes necessary to assure that all requirements are met, and shall also be guilty of a misdemeanor and upon conviction of any such violation shall be subject to a fine of not more than two hundred dollars or imprisonment in the county jail for not to exceed ninety days, or both, in the discretion of the court for each and every such separate violation. The contractor shall also comply with the requirements of §215.19 relating to the rate of payment for wages of laborers, mechanics and apprentices.

In other words, the law does not require the contractor to supply a "release of lien" from subcontractors, materialmen or persons employed in the construction.

Section 235.32, F. S., above-quoted does require a performance bond from the contractor which protects the school board as well as subcontractors, laborers and materialmen.

If a contractor will not or cannot furnish a release from a subcontractor even though required to do so by the bid specifications, it would appear reasonable to at least require an affidavit from the contractor that all of his debts incurred in constructing the building have been paid prior to final payment by the board to the contractor. (See §255.05, F. S.)

064-46—March 24, 1964

LOTTERIES

REAL ESTATE SALES PROMOTIONAL SCHEMES— §§849.091, 849.14, F. S.

To: *John W. McWhirter, Jr., Florida Installment Land Sales Board, Tampa*

QUESTION:

Do the following promotional plans violate the state lottery laws?

STATEMENT OF PLANS:

1. The sponsoring real estate promoters provide the participant-potential customer with a ticket which, when presented at the real estate promotional site, entitles the bearer to a free hydroponic plant.

2. The participant is provided with a ticket which, when deposited at the real estate promotional site, entitles the bearer to a chance to win a polaroid camera.

3. The winning participant is selected on the basis of the skill which he demonstrates in solving a puzzle contest. The winner of such contest receives a real estate home site, or a down payment thereon.

4. The participant, by registering at the real estate promotion site, obtains a chance to win a "door prize."

5. This plan involves a promotional scheme ticketed as "Win A Weekend," whereby the contestant is required to fill out general information pertaining to his name and address.

This office has uniformly held that a lottery consists of 3 elements: the selection of the winner by *chance*; the providing of a *prize* to such winning participant; and the requirement that the participant give *consideration* for the chance to win.

In plan 1 there is no selection by chance, as each ticket holder is entitled to a hydroponic plant upon doing an act which is completely within his control, to wit: taking the ticket for the hydroponic plant to the real estate promotional site. Therefore plan 1 does not violate the lottery laws of Florida.

In plan 2 the elements of prize and chance are patent. The element of consideration is also present under the rationale of AGO 060-76 wherein it was held that the requirement that the participant in a promotional scheme go to the place of business of a sponsor furnishes the element of consideration necessary for a lottery. Therefore plan 2 violates the lottery laws of this state.

The necessary element of chance is lacking in plan 3 because the element of skill predominates over the element of chance in the selection of the winner. The contest therefore does not violate the lottery laws of this state. This office has held that where a participant in a contest of skill is required to give tangible consideration in order to engage in a contest of skill the contest would violate §849.14, F. S., which prohibits betting on contests of skill. Tangible consideration is that which has monetary value. A review of plan 3 indicates that no tangible consideration is required of the contestant and therefore plan 3 does not violate §849.14, F. S.

The analysis given above for plan 2 is applicable to plan 4. Consideration is provided by the requirement that the contestant attend the real estate promotion site, regardless of whether such site be at the real estate area, or be a lecture hall where the contestant is exposed to that which constitutes a sales pitch. The elements of chance and prize are patently present and therefore the 3 elements which give rise to a lottery, i.e., chance, prize, and consideration, are present in plan 4, and such plan does violate the lottery laws of this state.

The enclosures which accompanied your letter contain a form entitled "Win A Weekend" (which we have designated earlier in this letter as plan 5). Neither the form nor the letter, however, provide sufficient information as to the characteristics of the plan to enable this office to render an opinion as to whether the plan violates the lottery laws of this state. If filling out the form, however, only entitles the participant to a chance to win a weekend vacation, and the participant must give consideration, even though it be of an intangible nature, such as attending the sponsor's place of business, the plan would violate the lottery laws of this state.

The recent legislation found in §849.091, F. S., has been considered and found to be inapplicable to the contests presented in your letter, because, by its terms, §849.091, *supra*, is limited in application to contest sponsors licensed under Chs. 204 and 208, F. S., and the instant sponsors, real estate brokers, are not so licensed.

In summary, plans 1 and 3 are authorized under the laws of this state, while plans 2 and 4 violate the lottery laws of this state. There is insufficient information at hand to enable us to determine whether the "Win A Weekend" plan constitutes a lottery.

064-47—March 26, 1964

ESCHEAT

UNCLAIMED OR ABANDONED FUNDS HELD BY CLERK OF
CIRCUIT COURT—CONSTRUCTION OF §§54.04-54.06 AND
717.09, F. S.—§§717.03-717.10, 717.12, F. S.*To: Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Does §717.09, F. S., cover all funds held in excess of 15 years by the clerk of the circuit court in his capacity as a trustee or otherwise, including those moneys paid into court under §§54.04, 54.05 and 54.06, F. S.?

2. To what extent is §717.09, F. S., additional and supplemental to §54.06 of the said statutes as to the annual accounting of unclaimed funds to the state comptroller under §717.12, F. S.?

3. To what extent is the office of the clerk of the circuit court governed by these statutes respectively?

Section 54.04, F. S., requires that:

All moneys paid into any court of the state and received by the officers thereof, in any case pending or adjudicated in such court, shall be forthwith deposited with the treasurer of the state or in a designated depository of funds for the state, in the name and for the credit of such court . . .

The remainder of the section relates to the security protecting the said fund and its administration by the officer and the depository. The section seems to apply to those moneys paid into court in connection with the filing of litigation or pursuant to the orders and decrees of the said court, to remain on deposit in most instances during the pendency of the cause in connection with which the deposit was made. Section 54.05, F. S., regulates the method and manner of withdrawing such funds from the depository when purposes and requirements of the said deposit of funds have been met and the deposit is no longer needed or required. This provision contemplates withdrawal by or for the person or persons entitled to the said fund.

Section 54.06, F. S., provides that:

In every case in which the right to withdraw money so deposited, as hereinbefore provided, has been adjudicated, or is not in dispute, and such money has remained so deposited for five years or more unclaimed by the person, firm or corporation entitled thereto, it shall be the duty of the judge, or one of the judges of such court, or its successor, on or before the first day of December each year, to direct that such money be deposited with the state treasurer to the credit of the state school trust fund, to become a part thereof, . . .

subject to the rights of the person, firm or corporation entitled thereto to obtain the possession thereof in the manner provided in §54.06(3), F. S.

Section 717.09, F. S., provides that "all intangible personal property, held for the owner by any court, public corporation, public authority or public officer of this state, or a political subdivision thereof that has remained unclaimed by the owner for more than

fifteen years is presumed abandoned," for the purposes of Ch. 717, F. S. Sections 717.03-717.08 and 717.10 relate to unclaimed or abandoned intangible personal property in the hands of the holders therein named, which has remained unclaimed for more than 15 years, which by said sections of the statutes "is presumed abandoned."

Section 717.12, F. S., requires that, "every person holding funds or other property, tangible or intangible, presumed abandoned under this act (statute) shall report to the administrator (state comptroller) with respect to the property" within Ch. 717, F. S., which is presumed abandoned under the terms and provisions of said chapter. The form and nature of the report is provided by said §717.12, F. S. Moneys paid into court, within the meaning and purview of §§54.04-54.06, F. S., which are within the purview of §54.06, F. S., and classified as unclaimed thereunder, would appear to be "presumed abandoned" under §717.09, F. S., after they have remained "unclaimed by the person, firm or corporation entitled thereto," for the period of 15 years. This 15 years would run from the beginning of the 5 year period mentioned in §54.06, F. S., so that the first part of the 15 year period and the 5 year period run concurrently.

The 15 year period of time mentioned in §717.09, F. S., in connection with moneys paid into court in connection with litigation, appears to run from the date the person entitled thereto would be entitled to claim the possession thereof, and not from the date of the deposit in court, which in most cases would be upon the termination of the litigation. In connection with deposits made into court as required by §74.05, F. S., in eminent domain proceedings, the 15 year period mentioned in Ch. 717, F. S., does not run from the date of the paying of the money into court but from the date the landowners are entitled to be paid their awards for the property taken and on the unused portion of the deposit from the date the unused portion of the said award is determined and the party making the deposit is entitled to a refund thereof.

Section 717.09, F. S., is applicable to all funds held by the clerk of the circuit court, in his capacity as such clerk but not individually, for a period of 15 years from the time the person or persons (including persons, firms and corporations) entitled thereto is entitled to claim the same from him. Although funds held by the clerk of the circuit court, in his capacity as clerk, are in general terms fiduciary funds, they are not within the purview of §717.08, F. S., but within the purview of §717.09, F. S. Funds held by him in his individual capacity for a period of 15 years may well be within the purview of said §717.08, F. S.

AS TO QUESTION 1:

All funds held by a clerk of the circuit court in his official capacity, is answered in the affirmative, as of the running of the 15 year period.

AS TO QUESTION 2:

By limiting the period of time the clerk, the state depository, or the state treasurer may hold or retain the funds under §54.06, F. S., to a period of time not exceeding 15 years from the time the said funds are to be deemed abandoned under §717.09, F. S.

AS TO QUESTION 3:

By stating that §§54.04-54.06, F. S., are applicable to the clerk of the circuit court, until the funds thereunder have re-

mained unclaimed by the person entitled thereto for a period of 15 years when \$717.09, F. S., becomes applicable.

064-48—March 30, 1964

INSURANCE

LICENSED AND UNLICENSED AGENTS—DIVIDEND SHARING—§626.0218(1), F. S.

To: *J. Edwin Larson, State Treasurer and Insurance Commissioner, Tallahassee*

QUESTION:

May the stockholders of an incorporated insurance agency which is engaged in the life insurance business, such stockholders not holding valid licenses and qualified as life insurance agents, receive stockholders dividends from the insurance activities of said incorporated agency?

Section 626.0218(1), F. S., operates as a prohibition against the payment of commissions or other valuable consideration for services as a life insurance agent to any person not holding a currently valid license to act as a life insurance agent.

The above section provides an exception to its initial pronouncement by recognizing that a life insurer may pay commissions or valuable consideration to and that a licensed life insurance agent may share any commission or consideration with an incorporated insurance agency. The particular type of incorporated insurance agency to which such funds may be paid is one in which "all employees, stockholders, directors or officers *who solicit, negotiate or effectuate life insurance contracts are qualified life insurance agents holding a currently valid license* as required by the laws of this state." (Emphasis supplied.)

Said section does not appear to require that all stockholders of the incorporated insurance agency be licensed insurance agents; rather, it appears that only those persons actively engaged in the life insurance business who are either employees, stockholders, directors, or officers of the corporation are required to hold a currently valid license.

Hence, it would appear that where shares of stock in an incorporated insurance agency engaged in the life insurance business are held by persons not actually engaged in the solicitation or effectuation of life insurance contracts, such stockholders would be entitled to a distributive share of corporate profits in the same manner as all other shareholders of the corporation. We find no requirement that all stockholders of an insurance agency be licensed and qualified to engage in the insurance business.

Your question is accordingly answered in the affirmative.

064-49—March 30, 1964

TAXATION

INTANGIBLE AND DOCUMENTARY STAMP TAXES— ADDITIONAL ADVANCES SECURED BY MORTGAGE— §§201.08, 199.11(5), 697.04, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Are intangible personal property taxes due on

"additional advances" when such additional advances never increase the current obligation?

2. Are intangible personal property taxes due on "additional advances" when additional advances increase the current obligation beyond the original mortgage obligation?

3. Are promissory notes used in connection with and secured by "additional advance" agreements subject to Florida documentary stamp taxes, in either or both of the foregoing instances?

To illustrate, let us presume that the original mortgage obligation, secured by a mortgage lien on real property in this state, was in the sum of \$5,000, upon which class "C" intangible personal property taxes were duly paid at the time of the recording of the mortgage securing the payment of the said \$5,000 obligation, and upon which documentary stamp taxes were duly paid under §201.08, F. S., so that the intangible personal property tax, and documentary stamp tax, obligations were duly paid at the time of the closing of the said transaction.

After making payments on the said \$5,000 sufficient to keep the interest current and reduce the principal to the sum of \$3,000, the maker obtains an additional loan or advance of \$2,000, increasing his obligation to the holder of the \$3,000 unpaid balance to the sum of \$5,000, the same in amount as the original obligation, and subsequently an additional loan or advance of \$2,000 or more, increasing the obligation to the holder of the \$3,000 unpaid balance to a total of \$7,000 or more. For the purposes of this opinion, we will presume that the mortgage securing the original \$5,000 loan or advance made provision for the securing of the said additional loans or advances by the lien of the mortgage which secured the original obligation of \$5,000.

It is presumed that the original mortgage securing the original loan or advance of \$5,000 was so drafted as to secure the additional advances, sometimes referred to as dragnet mortgages (*First v. Byrne*, 238 Iowa 712, 28 N. W. 2d 509, text 513), and as anaconda mortgages (*Berger v. Fuller*, 180 Ark. 372, 21 S. W. 2d 419, text 421), also as open end mortgages, or that the mortgage was so amended as to secure the payment of the said additional advances. The additional advances of \$2,000 or of \$4,000 or more were clearly additional obligations to the original \$5,000 loan or advance, and this notwithstanding that \$2,000 had been paid on the original loan or advance before the additional loans or advances were made by the lender.

Section 697.04, F. S., authorizes the making and recording of mortgages encumbering real or personal property in this state, securing advances to be made subsequent to the making of the original loan or advance, said section declaring the priority of such original obligation and future advances. Section 199.11(5), F. S., relating to class "C" intangible personal property, provides that:

If the mortgage, deed of trust, or other lien subject to the tax levied by this subsection secures future advances as provided in section 697.04, the tax shall be paid at the time of execution on the initial debt or obligation secured excluding future advances; at the time, and so often as, any future advance is made the tax shall be paid on all sums then advanced . . .

From the above and foregoing it is clear that intangible personal property taxes are due and payable on the original loan obligation, secured by a mortgage deed of trust or other lien on real property, as well as on any future advances when also secured by the same or other mortgage, deed of trust or other lien encumbering real property in this state. Taking the example above-mentioned there would be a class "C" intangible personal property tax on the original \$5,000 and on the additional \$2,000 advance or loan, and including any other additional advances or loans, the tax on the original \$5,000 loan being payable when the mortgage securing it is recorded, and on the additional advances or loans when made. These observations answer questions 1 and 2 in the affirmative.

Presuming that the original obligation of \$5,000 secured by the mortgage is evidenced by a promissory note, nonnegotiable note, or written obligation to pay money, which would include a covenant in the mortgage, it is subject to documentary stamp taxes under §201.08, F. S., and "additional advances" are also subject to documentary stamp taxes if evidenced by any promissory note, nonnegotiable note or other written obligation to pay money upon which payment of the additional advance might be enforced in court, which may include the original papers signed by the maker or makers of the obligation and of any "additional advance" or advances.

064-50—March 30, 1964

TAXATION

CONSTRUCTION OF §§203.01, 203.02, F. S.—MEANING OF TERM "NATURAL GAS"—CHS. 15658, 1931, 26545, 1951, 63-253, 59-372, LAWS OF FLORIDA; CHS. 203, 213, 350-364, 366, 367, F. S.

To: *John D. Moriarty, General Counsel, Florida Revenue Commission, Tallahassee*

QUESTION:

What is the meaning of the phrase "natural . . . gas for light, heat or power" used in §203.01, F. S., and on which an excise tax is imposed by said section?

The term "natural gas" in the English language appears to have about 3 different connotations or shades of meaning. In its broadest sense it includes all material in gaseous phase which has not been manufactured by man; in another sense, it includes and refers to gas which occurs in underground reservoirs either in gaseous form or dissolved in a liquid; and in a more limited sense, to gas used for heating, heat and power, of which there appears to be several varieties. The so-called "natural gas" now transmitted from the gas and oil fields through extensive pipelines to most all areas of the U. S. and many other countries, although referred to as natural gas, is a product of natural gas conditioning or products comprising the natural gas as it comes from the wells are separated therefrom and sold or used for a variety of purposes. Of the gases, elements, compounds and other products, comprising natural gas as it comes from the gas and oil wells, methane is almost always the principal component and sometimes amounts to substantially all of the natural gas as the same comes from the wells. In addition to the combustible gases coming from natural gas wells some non-

combustible gases are present, in more or less quantities, including carbon dioxide and nitrogen, sometimes in large quantities (See "gas" or "natural gas" in the several encyclopedias).

Natural gas as it comes from the wells contains methane, ethane, propane, propylene, butane, butylene, pentane, hexane, toluene, benzene, and many other inflammable hydrocarbons in gaseous form in fairly low temperatures. Many of the said gases are found, often in combination with others, in gaseous form comprising *natural gases* in the broad sense of the term, that is, gases found in nature in a natural form or combination. All of these gases are comprised of carbon and hydrogen elements in different combinations. Natural gas, so-called, distributed through pipelines is usually comprised of methane and ethane in different proportions, but consisting primarily of methane. So-called liquefied petroleum gases are usually comprised of propane, propylene, and butylenes in different combinations, such combinations differing between the warmer and colder areas and locations and in warmer and colder weather. Liquefied petroleum gases are, therefore, comprised of natural gases in different combinations, as is also the so-called natural gas sold for light, cooking and heating and delivered to the customers through pipelines and pipes. In a technical sense liquefied petroleum gases may be classified as a combination of gases naturally occurring as combustible gases in nature which are derived largely from natural gases produced by gas and oil wells.

The answer to the above posed question, when considered in the light of the above and foregoing observations, seems to pose the question of the construction of §203.01, F. S., insofar as the said section relates to the taxation of natural gas, therein referred to. Said section, insofar as here material, provides that "every person, including municipal corporations, receiving payment for electricity for light, heat or power, for natural or manufactured gas for light, heat or power, and for the sending of telegrams and telegraph messages, shall annually, on or before the fifteenth day of March, report to the comptroller of the state . . . the total amount of gross receipts derived from business done within this state . . . and, at the same time, shall pay into the state treasury the sum of one dollar fifty cents upon each one hundred dollars of such gross receipts . . ." This section originated as a part of Ch. 15658, 1931. The title to said act, insofar as here material, was: "An Act Imposing a Tax upon all Corporations, Firms and Individuals Receiving Payment for . . . Natural and Manufactured Gas for Light, Heat and Power . . .; Providing the Method of Collecting said Tax . . ."

The statement is made in 12 Encyclopedia Americana, 1960 Ed., 313, that in 1944 manufactured gas companies comprised the greatest portion of the gas industry in terms of customers; however, in 1956 of the some 30 million utility customers served in 1956 approximately 26 million were using natural gas and 4 million manufactured gas. Doubtless the ratio between the 2 types of customers has continued to increase as to the natural gas customers and decrease as to the manufactured gas customers. From this it seems that the majority of utility customers using gas for light, heat and power in 1931, used manufactured and not natural gas. Most utilities producing and selling manufactured gas for light, heat and power in 1931 delivered the same to their customers through gas pipes and mains, largely under the same plan and means as natural gas is delivered to customers in 1931.

The contention has been made that Ch. 203, F. S., which was derived from Ch. 15658, 1931, was intended to impose a tax only upon regulated utility services in this state, so that liquefied petroleum gases not being a regulated industry is not within the purview of §203.01, F. S., which imposes an excise tax upon the sale of electricity, natural and manufactured gas, telegram and telegraph services, etc. An examination of former statutes and laws relating to the regulation of the public utilities in this state reveals that only railroad, steamboat, telephone and telegraph and express company services were being regulated in 1931 (Chs. 350-364, F. S.). Chapter 366, F. S., which was derived from Ch. 26545, 1951, regulates the distribution and sale of electricity, natural and manufactured gas and similar gaseous substances, including the prices to be charged therefor. Public utility distribution of water and of sewer services were not regulated in this state until Ch. 367, F. S., which was derived from Ch. 59-372. As a matter of fact, the sale and distribution of liquefied petroleum gas, except as to the price to be charged therefor, has been regulated in this state since Ch. 527, F. S., which originated as Ch. 24302, 1947. When Ch. 203 F. S., originated as Ch. 15658, 1931, the sale of electricity and natural and manufactured gas was not regulated at the state level, although it may have been regulated in some cities and local areas by local or special regulations. When §203.01, F. S., was first adopted as Ch. 15658, 1931, its imposition of the excise tax therein provided was not limited to regulated utilities, the sale of natural and manufactured gas not then being regulated by state law.

From the enactment of Ch. 15658, 1931, by §3 thereof, and subsequently by §203.02, F. S., until the adoption of Ch. 63-253, 1963, the enforcement of said Ch. 15658, 1931, and Ch. 203, F. S., was vested in the state comptroller of Florida, such enforcement having passed to the state revenue commission upon the effective date of said Ch. 63-253. Upon investigation it appears that the comptroller, during the time the enforcement of said Ch. 203, F. S., was vested in him, did not construe said Ch. 15658, 1931, and Ch. 203, F. S., as imposing an excise tax on liquefied petroleum gas, whether sold in liquid or gaseous form, except when mixed with natural or manufactured gas and sold and distributed as such. This construction of the statute placed upon it by the administrative officer charged with its enforcement is persuasive and should not be overturned except for most cogent reasons, although not binding on the courts. (*State v. Massachusetts Co., Fla.*, 95 So. 2d 902, text 907; *L. B. Smith Aircraft Corp. v. Green, Fla.*, 94 So. 2d 832, text 835; 30 Fla. Jur. 206, §103).

In the light of the long standing construction of Ch. 203, F. S., by the officers administering the same as above-mentioned, we do not think that it should at this time be construed as extending to the sale of liquefied petroleum gas, which is usually comprised of propane, propylene and butylenes in different combinations, which gases, although derived from the natural gas coming from gas and oil wells, do not comprise the gas sold under the name of *natural gas* or *manufactured gas* for household and commercial use, so that liquefied petroleum gas is not within the purview of said Ch. 203, F. S.

This opinion supersedes and replaces question 4 posed and answered in our AGO 063-100, of Aug. 12, 1963, which did not take into consideration the now apparent long standing construction placed on §203.01, F. S., by the officers administering the enforcement of said section.

064-51—March 31, 1964

TEMPORARY MENTAL INCOMPETENCY

EFFECT OF CERTIFICATION THAT ALLEGED INCOMPETENT WILL NOT BENEFIT FROM FURTHER HOSPITALIZATION—§394.22(12) (a), (b), (h); CH. 394, F. S.

To: *Harvey E. Page, County Judge, Pensacola*

QUESTION:

Whether a person who has been temporarily committed to the state hospital under the provisions of §394.22 (12), F. S., and who, during the 6-month period therein provided, has been discharged by certificate assigning as the reason therefor that he will not benefit from further hospitalization, has been restored to his civil rights by virtue of such discharge?

Section 394.22(12), F. S., provides a method for temporary hospitalization of persons found to be only temporarily incompetent. Paragraph (a) provides for treatment "... for a period not to exceed six months."

Paragraph (b) provides for discharging the patient upon certification by the hospital staff at any time prior to the expiration of the 6-month period upon the happening of any one of 3 findings by the hospital staff:

1. That the patient is competent, or
2. that he has regained his status of mental competency, or
3. that he will not benefit from further hospitalization.

The said paragraph (b) provides that upon any one of the foregoing occurrences, the head of the hospital may discharge the person from the hospital by certificate stating the reason for discharge and further provides that the filing of such certificate with the county judge shall constitute a discharge of the alleged incompetent and terminate the proceedings thereon. It is noteworthy to observe that at this point, that is the filing of the certificate assigning any one of the 3 reasons for discharge, the statute designates the person as an "alleged incompetent."

It seems that this question is resolved by the last sentence in §394.22(12) (b), F. S., stating that the filing of the certificate of discharge constitutes a discharge of the alleged incompetent and terminates the proceedings thereon.

This view seems to find support in the provisions of §394.22 (12) (h) stating that the incapacity of the patient shall be presumed for the duration of the hospitalization, and that the patient's civil rights are suspended for the period of such hospitalization. While this paragraph provides that the filing of said order of certification shall be notice of such incapacity and suspension of civil rights, it also in the last sentence states the following:

... Provided that upon discharge of said person from the hospital, his civil rights shall be deemed automatically restored.

Thus the various paragraphs of §394.22(12), F. S., when read in *pari materia*, appear to make clear that the legislature intended commitment by certification under §394.22(12) to be of a temporary nature only, and that the legal effect of such certification be terminated upon the passage of the 6-months period or prior discharge of the patient by certificate of the staff assigning any one of the 3 criteria as contained in §394.22(12) (b), F. S.

It may be noteworthy to observe that references contained in Ch. 394, F. S., relating to the loss or restoration of civil rights, obviously was intended by the legislature to refer only to the non-exercise of certain rights held by all persons during the pendency of incompetency, and such statutory reference to loss of civil rights not be confused with the same terminology when used in connection with the consequence of a criminal conviction.

In view of the above cited statutory provisions and the foregoing reasoning, the question propounded is answered in the affirmative.

064-52—April 9, 1964

AIR POLLUTION COMMISSION

RULES AND REGULATIONS—PROCEDURE FOR HANDLING VIOLATIONS—CH. 403; §§403.02(4), 403.10, 403.13-403.18, F. S.

To: *E. R. Hendrickson, Chairman, Air Pollution Control Commission, Gainesville*

QUESTION:

Does the Florida air pollution control commission have the authority to adopt a rule that would authorize the state board of health to order a shutdown of a plant, or any unit of operation thereof, without a hearing before the commission due to improper operation, operation not in accord with intent and design, improper operation of the air pollution control devices or when climatic conditions exist, which may contribute to air pollution?

Chapter 403, F. S., which creates the air pollution control commission, provides that such commission may adopt rules and regulations to control and prohibit pollution of the air. Section 403.10, relating to the function and power of the state board of health, provides that the said board shall control air pollution in accordance with the rules and regulations adopted by the said commission.

From a study of the proposed rules which you attached with your request for the advice of this office, it appears that the state board of health has recommended that the commission adopt certain amendments to Ch. 28-2 of its rules, which would authorize the said board to order a shutdown of any plant or unit operation which, through improper operation, operation not in accord with its intent or design, or when the air pollution control devices are improperly operated or are not operated according to their intent and design, and when adverse climatic conditions prevail so that a fumigation situation or other similar abnormal conditions exist which may contribute to air pollution. Said rule also provides that such violations shall constitute prima facie evidence of air pollution and that it shall be unlawful to resume operation of such plant or unit of operation after the time specified in the order for making the required corrections or changes has expired, unless the order has been complied with.

A study of Ch. 403, F. S., reveals that the statute is clear as to the procedure to be followed by both the board and the commission with respect to persons (see definition in §403.02(4)) violating the rules of the commission.

Section 403.13, F. S., provides, among other things, that when a complaint is filed with the board or the board has cause to believe that a person is violating any rule or regulation of the commission, the board shall cause a proper investigation to be made, and if it shall determine that a violation does exist, it shall immediately endeavor to eliminate such source or cause of air pollution by conference, conciliation and persuasion.

Section 403.14, F. S., provides that the board has 60 days after the filing of the complaint, or 60 days after it has cause to believe that a violation exists, to try to settle same by conference, conciliation and persuasion to correct or remedy such violation. If same is not corrected at the end of the 60 days, the board shall begin the proceedings for a hearing before the commission. Such procedure, as indicated by §§403.14 through 403.17, F. S., appear to be as follows: the complaint should be filed by the board with the commission, which shall show the charges against the person and require an answer thereto. A copy of same shall be served upon the respondent, with a copy of a notice as to the time and place of the hearing before the commission. At the hearing, the board shall present the case or evidence to support the allegations contained in the complaint, and the respondent may present its defenses. The commission or its duly authorized representative or representatives shall hear the matter in much the same manner as a judge or jury would hear any civil case.

Section 403.17, F. S., provides that if the commission shall determine that the respondent is violating any rule of the commission, it shall fix a time during which such person shall be required to take such measures as may be necessary to prevent same. The time shall not exceed 60 days unless the commission shall find that more than 60 days is reasonably necessary.

Section 403.18, F. S., provides injunctive relief as the means for enforcing the order of the commission if prevention or corrective measures are not taken in accordance therewith.

In view of the foregoing, I do not believe that the air pollution control commission can legally authorize the state board of health to order a shutdown of any plant or unit operation, inasmuch as the procedure for handling violations is clearly provided by Ch. 403 and should be followed. However, I believe that the commission may adopt a rule similar to that proposed in §28-2.03 (4) and (5), authorizing the state board of health to issue orders to persons which shall state the action, changes or correction necessary to control air pollution, and a time in which such action shall be taken; that failure to comply with such order of the board within the specified time shall be sufficient cause for declaring that conference, conciliation and persuasion have failed and further action shall be taken as provided in Ch. 403, F. S.

064-53—April 13, 1964

TAXATION

INTANGIBLE PERSONAL PROPERTY—BOND OR NOTE
 SECURED BY MORTGAGE OR LIEN ON LAND IN
 ANOTHER STATE—§§199.01, 199.02(3)-(5);
 CH. 199, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

How should a bond, promissory note or other obligation to pay money be classified under §199.02, F. S., when owned and held by a citizen or resident of Florida and secured by mortgage, deed of trust or other lien encumbering real property in another state?

The above-mentioned bond, promissory note or other obligation to pay money, whether secured by a mortgage, deed of trust or other lien encumbering real property in another state, appears to be intangible personal property under §199.01, F. S., and the definitions of "intangible personal property" in Black's law dictionary; 73 C.J.S. 156, §5; 21A Words and Phrases, 705-712; 11 Am. Jur. 2d 140, §101.

The supreme court, in *Genesee Corp. v. Owens*, 155 Fla. 502, 20 So. 2d 654, had before it the question of whether "notes, bonds and other obligations bearing date prior to January 1, 1942, for payment of money, which were secured by mortgage, deed of trust or other liens upon real or personal property located wholly without the State of Florida, were taxable for the year 1943 under the intangible personal property tax laws of Florida," which obligations were held taxable as intangible personal property. The said notes, bonds and other obligations were held taxable as class "D" intangible personal property.

Class "C" intangible personal property consists of notes, bonds and other obligations, bearing date subsequent to Dec. 31, 1941, which "are secured by mortgage, deed of trust or other lien upon real property situated in Florida . . ." Class "B" intangible personal property consists of notes, bonds and other obligations, bearing date prior to Jan. 1, 1942, which "are secured by mortgage, deed of trust or other lien upon real or personal estates, situated in Florida . . ." Bonds, promissory notes and other obligations to pay money having their situs in Florida are not within the purview of §199.02(3), F. S., defining "Class C intangible personal property." Intangible personal property having its situs in Florida, not subject to classification as class A, class B, or class C, intangible personal property, is classified as "Class D intangible personal property," of said §199.02(4), unless entitled to tax exemption under §199.02(5), or other applicable statute of law.

Therefore, bonds, promissory notes and other obligations to pay money, having their situs in Florida, including those owned and held by citizens and residents of Florida, and secured by mortgage, deed of trust or other lien encumbering real property in a state other than Florida, are subject to taxation under Ch. 199, F. S., as class D intangible personal property.

064-54—April 13, 1964

TAXATION

REFUND OF LICENSE TAXES PAID WHERE NO SUCH TAX DUE—STATE OR COUNTY—§§205.02, 205.15, 205.41, 205.52, 215.26, 193.40, 200.36; CH. 205, F. S.; CHS. 63-271, 59-181, 20722, 20723, 1941, LAWS OF FLORIDA

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a person over the age of 65 years pays, or is required to pay, an occupational license tax, but is exempt therefrom under §205.15, F. S., may such taxes paid be refunded to the person paying the said taxes?

Under §205.15, F. S., "all . . . persons sixty-five years of age or older, with not more than one employee or helper, and who use their own capital only, not in excess of five hundred dollars, shall be allowed to engage in any *business or occupation* without being required to pay for a license; except that this exemption shall not apply to any of the occupations specified in section 205.41," F. S. (Emphasis supplied.) provided that such persons make satisfactory proof to the county tax collector, or other taxing authority, that they have attained the said age of 65 years. Section 205.41, F. S., above-mentioned requires the payment of license taxes by "every fortune teller, clairvoyant, palmist, astrologer, phrenologist, character reader, spirit medium, absent treatment healer and mental healer and every person engaged in any occupation of a similar nature . . ."

It appears from your file, handed us with your request for opinion, that the person seeking a refund of license taxes paid, may have paid an annual state license tax of \$10 for each of the license years of 1959-1960, 1960-1961, 1961-1962 and 1962-1963, under §205.52, F. S., and a county license tax of \$5 for each of said tax years, under §205.02, F. S., making a presumed total of \$40 paid to the state, and \$20 paid to the county. The taxpayer claims exemption from such license taxes by reason of having attained the age of 65 prior to the beginning of the said 1959-1960 license tax year, and otherwise being within the purview of said §205.15, F. S. There appears to be applications for a refund of the state license taxes paid and also of the county license taxes paid. We presume that the said state and county license taxes paid have been paid into the state treasury and into the county depository so as to no longer be in the hands of the county tax collector.

Section 215.26, F. S., makes provision for the refund of payments made to the state "when no tax, license or account is due" and when "any payment (is) made into the state treasury in error," when otherwise within said §215.26, F. S., upon application to the state comptroller. As a condition to the refunding of the said taxes or licenses paid, application for such refund shall be filed with the state comptroller "within three years after the right to such refund shall have accrued else such right shall be barred . . ." Prior to the effective date of Ch. 63-271, (evidently June 3, 1963) this was an 18 months limitation (see Ch. 59-181, evidently effective May 28, 1959), and prior thereto was a 1 year limitation.

The rule in Florida appears to be that the legislature has the

power and authority to change a statute of limitation and make the change applicable to existing causes of action *provided that such change is made before the cause of action is extinguished* under the pre-existing statute of limitation. (*Corbett v. General Eng. and Mach. Co.*, 160 Fla. 879, 37 So. 2d 161, text 162; *Walter Denson & Son v. Nelson*, Fla., 88 So. 2d 120, text 122; *Garris v. Weller Const. Co.*, Fla. 132 So. 2d 553, text 555 and 556; *Robinson v. Johnson*, Fla. App., 110 So. 2d 68, text 70; *Martz v. Riskamm*, Fla. App., 144 So. 2d 83, text 87; 53 C.J.S. 908, §2; 34 Am. Jur. 35, §29; Annotation in 79 A.L.R. 2d 1082-1106). Any of the license taxes paid which had been paid more than 18 months prior to June 3, 1963, appear to be barred by the limitation mentioned in said §215.26, F. S., prior to its 1963 amendment, notwithstanding the said 1963 amendment, in that the time for making application for refund began running with the payment of the license tax.

Section 215.26, F. S., has no application to the county license taxes paid, so that a refund of such taxes paid is not governed by said section. It is the general rule that moneys paid into public treasuries may not be refunded unless such refunds have been provided for by statute or constitutional provisions (see 84 C.J.S. 1264, §632, et seq.). At common law taxes paid under protest could be recovered from the tax collector by the bringing of an action at law against him for the recovery of such funds before they passed into the treasury. We have no statute specifically providing for the refund of license taxes paid to a county when no such taxes are due or when made in error, as is provided by §215.26 as to state license taxes.

Section 193.40, F. S., provides that the "comptroller shall pass upon and order refunds where payment has been made voluntarily or involuntarily of taxes assessed on the county tax roll" which such payments are overpayments of payments when no taxes are due; and, under §200.36, F. S., of tangible personal property taxes under like conditions. Here the refund is of taxes paid, no reference being made to license taxes paid. This brings us to the question of the application of said §193.40 to license taxes. Section 200.36, F. S., was derived from §35, Ch. 20723, 1941, which chapter related specifically to intangibles and intangible taxes, and not to licenses and license taxes. Section 193.40, F. S., was derived from Ch. 20722, 1941, which chapter related specifically to ad valorem taxes and had no application to licenses taxes. The reference in the footnotes to this section to Ch. 10282, 1925, was in error, the section having originated as said §47, Ch. 20722, 1941. We find no provision in the statutes and laws of Florida for refunding the county's portion of the license taxes paid under and pursuant to Ch. 205, F. S., although there be no such tax due or such taxes were paid in error.

We therefore answer the above-stated question in the affirmative as to the state license taxes paid, but in the negative as to the county's portion of the said tax paid; although §215.26, F. S., makes provision for the refund of the state's portion of a license tax paid when no tax is due and overpayments of such a tax, we find no statute providing for a refund of the county's portion of such a tax. Application for a refund of the state's portion of the tax so paid will have to be filed with the state comptroller within the time allowed by law. It may be that some of the payments are barred by the limitations in said §215.26.

064-55—April 13, 1964

JUNIOR COLLEGES

EXPENDITURE OF SCHOOL FUNDS FOR EXHIBIT AT WORLD'S FAIR—CH. 237, F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee*

QUESTION:

May a junior college use school funds for participation in the educational section of the Florida exhibit of the New York world's fair?

Chapter 237, F. S., provides for financial accounts and expenditures of public school funds.

The principal question involved in this instance, it seems to me, is whether or not the expenditure of school funds contemplated in your question would serve a public school purpose.

I am advised that it is customary in many counties for the schools to participate in various county fairs and exhibitions in Florida by providing or helping to provide exhibits which are designed to inform the public as to school programs, accomplishments and needs.

I believe the same justification would exist regardless of whether the exhibit is being held in Florida or in the Florida exhibit at the New York world's fair.

It would appear that the expenditure of school funds for the purpose contemplated would be discretionary with the county school board. Assuming that the proposed exhibit in the opinion of the county school board serves a public school purpose, is reasonable and that the procedures for expenditures provided by state law and state board regulations are adhered to, your question is answered in the affirmative.

064-56—April 13, 1964

STATE BOARD OF EDUCATION

NATIONAL TEACHER EXAMINATION—AUTHENTICATION FOR RELEASE TO STATE BOARD OF EDUCATION OR COUNTY BOARD OF PUBLIC INSTRUCTION— §231.16(2) (a), F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee*

QUESTION:

Does the examining agency referred to in rule 130-4.09 of Ch. 130-4 of the "Rules of the State Board of Education of Florida" have the duty or responsibility to refuse the request of a person taking a test under rule 130-4.09 to authenticate, and to furnish, or report, to the state department of education or county board of public instruction a score which the examining agency has reason to believe is not a fair measure of such person's achievement, aptitude and intellectual competencies in the subject matter areas tested, assuming no fraud, discrimination or bad faith on the part of such examining agency?

Section 231.16(2)(a), F. S., provides, in part:

No certificate other than one interim certificate, valid for one year only, shall be issued to an applicant who has not made a score of at least five hundred or such higher minimum score as may be fixed by regulation of the state board of education, on the common examinations of the national teacher examinations, or on a comprehensive examination approved by the state board of education as at least equivalent thereto. . . .

Regulation 130-4.09 adopted by the state board of education relating to teacher examinations provides, in part:

(1) General provisions.—The following examinations and scores are found and declared to be equivalent and, when properly authenticated, each will be acceptable, subject to conditions prescribed herein, for meeting the examination requirements for competence awards, continuing contracts, and regular certification. . . .

(5)(a) Supervision.—The examination shall be conducted *only* in centers and by qualified examiners and proctors *approved by the agency providing the examination.* (Emphasis supplied.)

(5)(d) Scores.—Any score furnished the state department of education or a county board of public instruction *shall be properly authenticated by responsible officials of the agency administering the examination.* . . . the person taking the examination shall arrange with the examining agency to furnish authenticated scores directly to the state department of education, or to a county board of public instruction, . . . (Emphasis supplied.)

It is apparent from the above cited laws of Florida and regulations of the state board of education, which have the force and effect of law, that the examining agency has the duty and responsibility to furnish scores only in those cases *which have been authenticated by a responsible officer of the examining agency* and that since state and county school funds are expended as a result of and based upon said *authenticated scores*, it is the duty of the examining agency not to furnish scores which have not been properly authenticated by its officials.

In accord with the above, your question is answered in the affirmative.

064-58—April 22, 1964

TAXATION

INTANGIBLE PERSONAL PROPERTY TAXES, CLASS C— OBLIGATIONS EXECUTED ON MILITARY—CH. 199, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is a written obligation to pay money to a federal credit union secured by a mortgage encumbering real property in this state, subject to class C intangible personal property tax when made, executed and delivered on a military base in this state under the exclusive jurisdiction of the U. S.?

It is provided in §1768, title 12, U.S.C., that federal credit

unions, organized under §§1751-1772, title 12, of the U.S.C., "their property, their franchises, capital, reserves, surpluses and other funds and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any state, territorial or local taxing authority, except that any real and any tangible personal property of such federal credit unions shall be subject to federal, state, territorial and local taxation to the same extent as other similiar property is taxed. . ."

It is a general rule of law that the federal government, as well as the state government, and their instrumentalities, are not subject to state and federal taxation except to the extent permitted by their laws, or the federal constitution (84 C.J.S. 391, §206). National banks have been held to be federal instrumentalities (9 C.J.S. 1088, §552; 84 C.J.S. 293, §150). Federal credit unions are clearly instrumentalities of the federal government, created and established for the public welfare and are subject to taxation only to the extent permitted by the congress of the U. S. Section 1768, title 12, of the U.S.C. regulates the taxation of federal credit unions and their property. The authority of the states and their subdivisions and agencies to tax, as expressed in said section, does not include the authority to tax the intangible personal property of federal credit unions. The tax is not on the creation of the property, but upon the property itself.

The above stated question must be answered in the negative. There being no intangible tax due upon an obligation, secured by a mortgage encumbering real property in Florida, made and delivered to a federal credit union, no tax may be required as a condition to the recording of the said mortgage securing the obligation. This is true whether made within or without a federal area.

064-59—May 13, 1964

CRIMINAL PROCEDURE

COMPENSATION OF INTERPRETERS IN CRIMINAL CASES— §9, ART. XVI, STATE CONST.

To: *J. Lancelot Lester, State Attorney, Key West*

QUESTION:

In what manner and from what funds should an interpreter selected or appointed to act in a criminal proceeding be compensated?

An interpreter is defined in Black's law dictionary as "a person sworn at a trial to interpret the evidence of a foreigner or a deaf and dumb person to the court." An interpreter may also be used to translate documents, letters, etc., involved in litigation when written in a foreign language (88 C.J.S. 101, §42). An interpreter has also been referred to as a witness (*People v. Lem Deo*, 132 Cal. 199, 64 P. 265, text 266; *People v. Walker*, 69 Cal. App. 572, 231 P. 572, text 577; *People v. Ong*, 23 Cal. App. 148, 137 P. 283, text 286; *Commonwealth v. Corsino*, 261 Pa. 593, 104 A. 739, text 741; *Birmingham RR., Light & Power Co. v. Jung*, 151 Ala. 461, 49 So. 434, text 440). It is stated in 21 C.J.S. 216, §141, that "while it has been stated that an interpreter is more than a mere witness, and is, in a sense, an officer of the court, it has also been held that he is not a court officer, but merely an attendant." In *Paucher v. Enterprise Coal Mining Co.*, 183 Iowa 1076, 168

N.W. 86, text 87, the court stated that it was inclined to think, under the circumstances there involved, that the interpreter in that case was more than a mere witness. In 5 Jones on Evidence, 2nd. Ed., Revised and Enlarged 4541, §2321, it is stated that "an interpreter is more than a mere witness and is, in a sense, an officer of the court."

Where an interpreter is used in a case, the usual procedure is to administer an oath to the interpreter to truly interpret or translate between the court, the jury and the witness, the questions put to the witness and his answers thereto, after which the oath is administered to the witness by the judge or clerk in English, which oath is interpreted or translated to the witness by the interpreter, as it is pronounced by the clerk or judge, after which the questions are directed by the attorney to the witness in English, after which they are interpreted in the native tongue of the witness by the interpreter to the witness who answers in his native tongue to the court and jury, after which his answers are interpreted by the interpreter to the court and jury. (1 Thompson on Trials, 2nd. Ed., 379, §366).

Although an interpreter is in a general sense a witness, he is in fact more than a mere witness; he is in a sense an officer or attendant of the court, selected to interpret or translate the testimony of a witness in the case who testifies in a language different from the official language of the court, the jury and the court attendants. It is indicated in 23 C.J.S. 1065, §1006, that an interpreter may be necessary to the constitutional right of confrontation of the accused when he does not understand the official language of the court, as well as the right of due process of law (23 C.J.S. 863, §965). It is generally held that an interpreter called in a civil or criminal proceeding is entitled to compensation. See authorities cited in the first above paragraph next after the question posed above, and *Franconi v. Graham*, 89 O. 619, 174 P. 548, text 550; *Hall v. Northwest Lumber Co.*, 61 Wash. 351, 112 P. 369, text 372; *Commonwealth v. Hess*, 18 Pa. Co., 542; *Meyer v. Foster*, 16 Wis. 294.

Section 9, Art. XVI, State Const., provides that "in all criminal cases prosecuted in the name of the state when the defendant is insolvent or discharged, the legal costs and expenses, including the fees of officers, shall be paid by the county where the crime is committed. . . ." Prior to its amendment at the general election in 1894, this section provided that in such criminal cases "the State shall pay the legal costs and expenses, including the fees of officers. . . ."

From the above and foregoing we conclude that fees of interpreters used in the trial of criminal cases, when the defendant is insolvent or discharged, are payable from county funds as contemplated by §9, Art. XVI, State Const. The rule announced in AGO 058-313, of Nov. 26, 1958 (1957-1958 AGO 880-884) as to the payment of witness fees in connection with criminal prosecutions is applicable to the payment of the fees of an interpreter in like cases.

An expert witness has been defined as a person skilled in some art, science, trade, profession, business or other special knowledge, who testifies concerning conclusions formed from testimony given in court, or from observations made or facts gathered by him; a person who deduces inferences from scientific and technical knowledge based on facts and circumstances gathered by

him or brought to his attention. (15A Words and Phrases, 469-471; Black's law dictionary). An interpreter called or appearing in a court or other proceeding does not appear to be an expert witness within statutes and laws providing fees for expert witnesses.

Although interpreters may not be witnesses in the strict sense of the term, they have often been classified as such and not as expert witnesses, and should be paid as such, in the same manner and from the same funds as witnesses are paid.

064-60—May 13, 1964

TAXATION

INTANGIBLE PERSONAL PROPERTY TAXES—CONTRACTS FOR THE SALE OF REALTY—§§199.02(3), 199.11(3), F. S.; §1 ART. IX, STATE CONST.; CHS. 15789, 1931, 20724, 1941 AND 21943, 1943, LAWS OF FLORIDA

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. When are intangible personal property taxes due and payable on an agreement for the sale and conveyance of real property, when such agreement is not forthwith placed on record?

2. Is an assignment of an agreement for the sale and conveyance of real property subject to an intangible personal property tax?

3. Is an assignment of an agreement for the sale and conveyance of real property for the purpose of securing the payment of an obligation to pay money subject to an intangible personal property tax?

In *Jasper v. Orange Lake Homes, Inc.*, Fla. App., 151 So. 2d 331, the district court of appeal, second district, held that the unpaid balance of the consideration payable under an agreement for the sale and conveyance of real property was secured by an equitable lien on the property to be sold, and was, therefore, within the purview of §199.02(3), F. S., and class C intangible personal property, and subject to taxation as such under §199.11, F. S. The supreme court of Florida, in *Jasper v. Orange Lake Homes, Fla.*, 155 So. 2d 694, denied certiorari thereby leaving the holding of the said district court of appeal standing. Under the holding of these court cases the unpaid portion of the consideration for the sale and purchase of the lands described in the agreement for the sale and conveyance of real property, above-mentioned, is subject to class C intangible personal property taxes.

Section 1, Art. IX, State Const., provides for the imposition of an intangible personal property tax upon obligations secured by mortgage, deed of trust or other lien, which said tax "shall be payable at the time such mortgage, deed of trust or other lien is presented for recordation, said tax to be in lieu of all other intangible assessments on such obligations." The quoted provision of said §1, Art. IX, State Const., became a part of said section and article by amendment submitted by the 1943 regular session of the Florida legislature, and adopted by the people of Florida at the general election in 1944. The separate taxation of intangible personal property was authorized by the amendment of said section and article of the State Const., submitted by the 1923 regular ses-

sion of the legislature and adopted by the people of Florida at the general election in 1924. The said 1924 amendment was implemented by Ch. 15789, 1931, which divided intangible personal property into 3 classes for purposes of intangible personal property taxation, designated as classes A, B and C intangible personal property, class B being written obligations secured by mortgage, deed of trust or other lien or lease. Under §16 of said Ch. 15789, all intangible personal property taxes were due and payable on Nov. 1 of the tax year, or as soon thereafter as the intangible personal property tax roll came into the hands of the tax collector. Intangible personal property taxing statutes and laws were revised by Ch. 20724, 1941, under which intangible personal property was divided into 4 classes, designated as classes A, B, C and D intangible personal property, including "class C intangible personal property." These classifications are substantially the same as the classifications under present §199.02, F. S., except as to the provisions in subsection (2) of said section relating to the valuation of shares of stock and similar interests.

As above indicated, §1, Art. IX, State Const. provides in part that the intangible tax on written obligations to pay money "secured by mortgage, deed of trust or other lien" on real property in Florida "shall be payable at the time such mortgage, deed of trust or other lien is presented for recordation." Section 199.11, F. S., provides that such taxes are "due and payable when mortgage, deed of trust or other lien is executed and shall be paid to the county tax collector before the mortgage, deed of trust or other lien securing such indebtedness is presented for recordation." The last quoted language appears to have originated as a part of §13, Ch. 20724, 1941, and was contained in said §199.11, F. S., as amended by §2, Ch. 21943, 1943, which was enacted at the same session of the legislature the 1944 amendment of §1, Art. IX, State Const., was submitted to the electors at the general election in 1944.

The difference in the language used in §1, Art. IX, State Const., above quoted, and that used in §199.02(3), F. S., also above quoted, poses the question of the application of the statute if in conflict with the constitutional provision. It has long been the policy of this office to leave constitutional questions to the courts and not to pass upon them. Under this rule we will deem the statute and the constitutional provisions as each having a field of application, with the statute fixing the date the tax becomes due and payable and the constitutional provision prohibiting the recording of the mortgage, deed of trust or other lien unless and until the tax imposed has been paid. Some question may arise as to the record of such a mortgage, deed of trust or other lien, being and constituting constructive notice unless and until the said tax has been paid.

AS TO QUESTION 1:

Intangible personal property taxes are due and payable, on agreements for the sale and conveyance of real property, when the said agreement is executed and delivered, although not forthwith placed on record.

AS TO QUESTION 2:

Under §199.11(3), F. S., class C intangible personal property is subject to but one tax and is not subject to successive annual taxes whether held by its original owner or by assignees. This being true there will be no additional tax due upon an assignment

of the said intangible for the purpose of transferring the legal and equitable title thereto. Likewise an endorsement of the intangible, if negotiable, sufficient to transfer both legal and equitable title would not require any additional tax.

AS TO QUESTION 3:

However, where the said class C intangible personal property is transferred merely and only for the purpose of securing the payment of another note, bond or other written obligation to pay money, the note or other written obligation to pay money, being a different and separate intangible, would seem to be subject to an intangible personal property tax, usually under some other classification. Where an assignment of a class C intangible is given for the purpose of securing the payment of another obligation, such other obligation would appear to be subject to an intangible tax unless within some exemption provision of the statutes.

064-61—May 13, 1964

TAXATION

MANGROVE ISLANDS AND GROWTH AS LAND—FLOOD CONTROL DISTRICT TAXES—§§253.12, 378.29, 378.30, F. S.

To: *A. C. Bridges, Trustee Internal Improvement Fund, Tallahassee*

QUESTIONS:

1. Are mangrove islands and forest areas upland or submerged lands?
2. Are such mangrove islands and forest areas lands vested in the state of Florida or in the trustees of the internal improvement fund?
3. What lands held by the trustees of the internal improvement fund within flood control districts are subject to the flood control district taxes imposed under §§378.29 and 378.30, F. S.?

The lands described in the tax notices before us are located in sections 26, 27 and 33, township 43 south, range 25 east, which lands appear from maps and plats in the office of the trustees of the internal improvement fund, including U. S. coast and geodetic survey maps and plats in the said office, to be mangrove islands and forest areas located in the Calloosahatchee river above Fort Myers. It is our information that these mangrove islands and forest areas are still covered with a green and rank growth of mangrove vegetation.

We have examined articles on "mangrove" islands, forests, plants, etc., in the Encyclopaedia Britannica, the Encyclopedia Americana, the World Book Encyclopedia, the Book of Knowledge Encyclopedia, and other works treating the subject of mangrove plants, islands and forests, from which it appears that mangrove plants will survive and grow only in ocean and other salt waters, being nurtured by substances in such waters, and that such plants will grow and survive only when fed by the waters flowing through its root mass and around its roots; and that when such ocean and other salt waters are excluded from the plant's root system the plant will die. The mangrove plants, as they grow and multiply, form a mass through which the ocean and other salty waters flow nurturing the plants and causing them to grow and increase the massive root system. This massive root system catches silt, sand,

and other solids, causing the same to settle to the bottom, thereby building up the water bottoms and lands. When this root system of the mangrove becomes filled with sand, silt and solids, until the ocean and other salty waters cannot flow through the root system of the plant the plant dies leaving the built-up land. When the water bottom has built up so that the high tide no longer covers the mangrove roots the mangrove dies. In 11 World Book Encyclopedia 4759, we find the statement that with mangrove plants "the thousands of stiltlike roots catch silt, which piles up in the quiet water . . . at last the plant is left standing in the mud above the reach of the tide. But it kills itself in forming land, for its roots must be bathed in ocean water, at least during high tide."

In *Montano v. Insular Government*, 12 Philippines 572, text 581, the supreme court of the insular government held mangrove swamps and growths along the shore to be similar in nature to mud and similar flats along the shore which are washed by the tides of the sea. It appears from this opinion that the court deemed mangrove islands and forests to be the property of the government and having the nature of swamps and swampy lands which are washed by the average high tides of the ocean or other salt waters; also that, at least in the Philippine areas, they are often used as public fisheries.

In most instances the tides of the ocean and other salt waters rise and fall through the mangrove islands, swamps and growth, covering the lands upon which the mangrove growth exists and grows, although much of the mangrove plant exists and is above such lands and the water at high tide. The vegetation of the mangrove growth is not land itself, but is vegetation growing on land, that is submerged land. Vegetation growing upon submerged lands covered by the average high tide of the ocean or other salt waters should not be taken and deemed to be land until the land upon which such vegetation grows, builds up, and is no longer covered by the high tide. Until the lands upon which mangrove is growing are built up to such an extent that they are not covered by the average high tide, such lands retain the character of submerged land and cannot be classified as upland. It appears from the above authorities that so long as the mangrove continues to remain green and is growing that the lands upon which such mangrove is growing are being covered by the high tide and are submerged land. As soon as the land upon which the mangrove grows is built up so that the average high tides no longer cover the same, it appears that the mangrove will and does die.

In the light of the above and foregoing, mangrove islands and forest areas are *submerged* lands so long as the mangrove plants, or at least a large majority of them, remain green and continue to grow, and such area becomes upland only when the mangrove growth, or the major part thereof, dies and is no longer green and growing.

Under §253.12, F. S., the title to "all sovereignty tidal and submerged bottom lands, in the tidal salt waters of the state of Florida, including all islands, sandbars, shallow banks and small islands made by the process of dredging of any channel by the United States government and similar . . . are vested in the trustees of the internal improvement trust fund" of the state. Under this section of the statutes all mangrove islands and forest areas, so long as the mangrove plants continue to grow and remain green, are to be considered as submerged lands vested in the said trus-

tees of the internal improvement fund. However, when the mangrove plants, or the major part thereof, have died, the said lands become upland instead of submerged lands; however, the title to such lands will continue to be vested in the said trustees.

Section 378.30, F. S., provides that the flood control district taxes imposed under and pursuant to §378.29, F. S., shall be imposed upon the "lands held by the trustees of the internal improvement trust fund," within the flood control district, provided, however, "there shall be excluded from district taxes all bodies of navigable water and unreclaimed water areas meandered by the public surveys." The mangrove islands and forest areas above-mentioned and described in the tax notices above-mentioned as being in sections 26, 27 and 33, township 43 south, range 25 east, appear to be within the meandered area, described in the surveys and on the survey maps, as being the Calloosahatchee river, and was excluded from said survey. Unless and until the mangrove islands and forest areas above described have filled in and become upland, and the mangrove growth or a major portion thereof has died, as above discussed, the so-called mangrove islands and forest areas remain submerged lands and not upland, and are within the exemption from the flood control district taxes provided for in §378.30, F. S. Not until such mangrove islands and forest areas have become upland and the mangrove growth or major portion thereof has died, will such lands be taken from under the exemption provided in said §378.30, F. S.

All lands held by the trustees of the internal improvement trust fund, except "all bodies of navigable water (and the submerged lands thereof) and the unreclaimed water areas meandered by the public surveyor," are subject to the taxes imposed under §378.30, F. S. Mangrove islands and forest areas remain submerged lands within this exemption from taxation, unless and until such areas have filled in and become upland and the mangrove growth, or a major portion thereof, has died.

064-62—May 13, 1964

REAL PROPERTY

SALE OF CONDOMINIUM PARCELS AND RIGHTS AND INTERESTS THEREIN—§§711.03-711.05, 711.08, 697.01, 697.02; CH. 711, F. S.; CH. 63-35, LAWS OF FLORIDA; §7, ART. X, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. May the developer and builder of a condominium under Ch. 711, F. S., sell and convey the condominium parcels or any of them subject to a reservation of rental to the developer for a period of 99 years?

2. Is such a rental arrangement for a period of 99 years with a reservation to the owner permissible under Ch. 711, F. S., and a legal estate thereunder?

Some confusion appears to have arisen because of AGO 064-20, of Feb. 4, 1964, which dealt with ad valorem taxation of condominium parcels of real property, some having construed the said opinion as holding that only a fee simple absolute title may exist in a condominium parcel. When dealing with ad valorem taxation in this state we must keep in mind that "under Florida taxing statutes the levy and assessment is on the realty itself, at its full

cash value, regardless of the existence of estates in it," (*Bancroft Inv. Corp. v. Jacksonville*, 157 Fla. 546, 27 So. 2d 162, text 167), unless otherwise provided by law. This being true, ad valorem taxes are imposed against the condominium parcel without regard to the existence of estates in it. In our said opinion of Feb. 4, 1964, we dealt with the taxable interest in a condominium parcel only, and its right to tax exemption. Opinions of this office, like opinions of the courts, should be construed in the light of the question presented for opinion.

A "condominium parcel means a unit together with the undivided share in the common elements which is appurtenant to the unit"; a "unit means a part of the condominium property which is subject of private ownership"; and a "unit owner or owner of a unit means the owner of a condominium parcel." (§711.03, F. S.). "A condominium parcel is a separate parcel of *real property*, the ownership of which may be in fee simple, or *any other estate in real property recognized by law*." (§711.04(1), F. S.). (Emphasis supplied.)

In 1 Thompson on Real Property, Perm. Ed., 65, §59, it is stated that "at common law 'real property' was deemed coextensive with lands, tenements and hereditaments, corporeal and incorporeal; and in this country, both by statute and common law, the term is generally used for the phrase 'lands, tenements and hereditaments,' but 'real estate' and 'real property' are not strictly convertible terms. Since in its restricted and technical sense real estate signifies every estate or interest one may have in land except a mere chattel interest." To the same effect see also 73 C.J.S. 159, §7, and 42 Am. Jur. 195, §13. The provision in §711.04(1), F. S., that "a condominium parcel is a separate parcel of *real property*, the ownership of which may be in fee simple, or *any other estate in real property recognized by law*," clearly includes *lands, tenements and hereditaments*, which phrase is generally held to be "lands and interests in lands, corporeal and incorporeal, capable of descending to an heir at law." (Emphasis supplied.)

In *Mathews v. McCain*, 125 Fla. 840, 170 So. 323, text 325, the supreme court of Florida remarked that "the lease in question was made for a term of five years. It was a chattel real . . ." It is stated in 73 C.J.S. 161, §7, notes 84 and 85, that the phrase *lands, tenements and hereditaments* "includes only freehold estates, and does not include leases for years." Numerous cases hold leasehold estates for a term of years as personal property and not real property (*First Trust & Deposit Co. v. Syrdelco, Inc.*, 292 N.Y.S. 206, text 208; *Santa Barbara v. Maher*, Cal. App., 77 P.2d 306, text 307; *Keystone Pipe and Supply Co. v. Crabtree*, 174 Okla. 562, 50 P.2d 1086, text 1088; *Comer v. Light*, 175 Ind. 367, 93 N.E. 660, text 663; *Duff v. Keaton*, 33 Okla. 92, 224 P. 291, text 295; *Kreling v. Walsh*, 77 Cal. App. 821, 176 P.2d 965, text 972; *Blake v. Shower*, 356 Mo. 618, 202 S.W.2d 895, text 897; *Sheaffer v. Baeringer*, 346 Pa. 32, 29 A.2d 697, text 698; *Charter v. Maxwell*, 132 W. Va. 282, 52 S.E.2d 753, text 759; *Offutt Housing Co. v. Sarpy County*, 160 Neb. 320, 70 N.W.2d 382, text 390; *Moche v. Leno*, 227 N.C. 159, 41 S.E.2d 369, text 370; *Lincoln Nat'l Bank and Trust Co. v. Nathan*, 19 N.E.2d 243, text 247; *Guerin v. Blair*, Cal. 2d 744, 196 P.2d 651, text 652). There are also numerous cases holding leasehold interests, especially long time leases, to be real property; however, an examination of this line of cases indicates that many of them,

and maybe most of them, may be based on statutes or constitutional provisions changing the common law rule in this respect.

In 1 Thompson on Real Property, Perm. Ed., 67, §61, it is stated that "at common law an estate less than a freehold, such as estates for years, at will and by sufferance, was personal property, and passed primarily, on the death of the owner, to the executor or administrator. These interests were termed 'chattels real.'" In 42 Am. Jur. 206, §25, it is stated that a "term for years, while denominated a chattel real, is not, when speaking with legal accuracy, considered real estate, but on the contrary is personal property, whatever might be its duration in years, whether for one or twenty, or ninety-nine years . . ." In the present state of the Florida authorities, as well as the outside authorities bearing on the question, we doubt that a leasehold interest in real property for a term of years, whatever may be its duration, may be classified as "real property, or any other estate in real property recognized by law" within the purview of §711.04(1), F. S. However, we await the determination of the question by the Florida courts of last resort, and do not here so hold. Until this question is put at rest by the supreme court of Florida we cannot recommend that a condominium be constructed and established upon a leasehold estate for a term of years, however long, and feel that a person doing so will do so at his own risk until the question has been finally determined by the supreme court of Florida.

Because of the provision in §711.04, F. S., that "a condominium parcel is a separate parcel of real property, the ownership of which may be in fee simple, or any other estate in real property recognized by law," and the provision in §711.08, F. S., that "a condominium may be created by recording in the public records of the county wherein the land to be included is located a declaration executed with the formalities of a deed by all persons having title of record to such lands," together with the declaration required by said section, we feel that the legislature contemplated that condominiums be *located on real property*, the ownership of which "may be in fee simple, or any other estate in real property recognized by law." The problem presented is whether a leasehold estate for a term of years is "real property recognized by law" within the purview of said statutory provisions. In the present state of the Florida law we are not in position to say that it is or is not until the question has been put at rest by the Florida courts.

In the above and foregoing we have dealt with the establishment and creation of the condominium and the title of the person, firm or corporation creating and constructing the same, and not the transfer of rights, titles and interests in the condominium parcels after the creation and establishment of the same. It is provided in §711.04(1), F. S., that a "condominium parcel is a separate parcel of real property, the ownership of which may be in fee simple, or any other estate in real property recognized by law." The common elements attached to a condominium parcel pass with it as appurtenances (§711.04, F. S.) whether or not described, and may not be separated therefrom (§711.05, F. S.). A reading and construction of said Ch. 711, F. S., leads to the conclusion that the owners of condominium parcels may encumber their said parcels by mortgage or lien, and such mortgage or lien may be enforced by foreclosure in case of default.

The statement in §711.04(1), F. S., that "a condominium parcel is a separate parcel of real property, the ownership of which may

be in fee simple, or any other estate in real property recognized by law," does not seem to require that the title to a condominium parcel be vested in the owner thereof in fee simple absolute, but such title may be vested in the owner thereof in any other "estate in real property recognized by law." As a general rule estates in real property recognized by law seem to include all interests in real property other than leasehold estates for a term of years, estates at sufferance, estates at will and other interests in real property which would not descend to their heirs of the owner but to the personal representative under the common law. It would seem that the owner of a condominium, held in fee simple, may convey "any other estate in real property recognized by law" less in quantum to his fee simple title, so long as the estate so conveyed is an estate in real property as above discussed.

We, therefore, come to the conclusion that the owner in fee of a condominium parcel may sell and transfer "any other estate in real property recognized by law" less than his said fee, and may thereafter sell and transfer any interest retained by him after the transfer of such "other estate in real property recognized by law," so long as the same is transferred subject to such other estate in real property recognized by law previously conveyed by him as aforesaid. (Emphasis supplied.)

"Subsequent to the recording of the declaration and while the property remains subject to the declaration (see §711.08, F. S.), no lien of any nature shall thereafter arise or be created against the condominium property as a whole except with the unanimous consent of the unit owners. During such period liens may arise or be created only against the several condominium parcels." (§711.20, F. S.). The phrase "subsequent to the recording of the declaration and while the property remains subject to the declaration" seems to relate to the time following the recording of the declaration provided for in §711.08, F. S., and not to the time prior to such recording. The provision in said §711.20, that during the period of time *subsequent to the recording of the said declaration* "liens may arise or be created only against the several condominium parcels," clearly indicates that liens on the entire property may not arise or be created after the recording of the declaration above-mentioned, "except with the unanimous consent of the unit owners," and this seems to mean each and every one of them, not merely a majority of them. The statement in §711.04, F. S., that "a condominium parcel is a separate parcel of real property, the ownership of which may be in fee simple, or any other estate in real property recognized by law," seems to require that the condominium building or buildings be constructed upon lands held in fee simple or any other estate in real property recognized by law," else the condominium parcel would not be an ownership in fee simple, or any other estate in real property recognized by law."

Although some provisions of Ch. 711, F. S., seem to contemplate that condominiums will be constructed on real property held in fee simple, or any other estate in real property recognized by law, there is no express requirement that such property be held free and clear of all liens, including mortgages within the purview of §§697.01 and 697.02, F. S. A ground rent appears to be a rent reserved by a landowner, to himself and heirs, out of the lands conveyed to another, which has been deemed a freehold estate by most of the court that has considered the question (see 18A Words and

Phrases, Perm. Ed., 627-628; 1 Thompson on Real Property, Perm. Ed. 445, §282; 38 C.J.S. 1093, §3; 32 Am. Jur. 869, 871 and 874, §§1039, 1041 and 1044). Most, if not all, of the authorities cited in support of the theory that ground rent is in the nature of a freehold estate appear to have involved ground rents for other than a fixed term of years, so that only title to real property, as distinguished from chattles real, was involved. "A 'ground rent' in the technical sense if the term is a rent reserved by the grantor to himself, and his heirs, out of the lands conveyed in fee simple," such ground rent being itself an estate in real property separate and apart from the lands conveyed. It is stated in 38 C.J.S. 1088, §2, that at "common law a technical ground rent is a rent service and not a rent charge or rent seck," and in said 38 C.J.S. 1093, §3, that "the grantee or lessee in the land itself is an interest or estate entirely distinct and of a different nature from that of the owner of the *ground rent*." (Emphasis supplied.) "In the mutual relation of the two estates, the estate which is created by the reservation of the rent is in the nature of an encumbrance; it is a reduction of the value of the land, and for nonpayment of the rent as it grows due, the land may be sold. The rent may be considered in the nature of 'purchase money' charged on the land forever, but the reservation of a technical ground rent does not diminish the estate conveyed." (38 C.J.S. 1093, §3). These authorities indicate that the conveyance of a fee title to real property, by its owner, to a grantee, reserving an annual or other ground rent without limitation of time thereon, would create in the grantee a *fee simple title or other estate in real property*, and in the grantor a ground rent also in the nature of *real property*.

In 38 C.J.S. 1088, §1, we find the following: "*Annuity distinguished*.—A *ground rent* considered as rent service 'reserved' is distinguished from the 'grant' of a rent charge or of an annuity." In 3 C.J.S. 1376, §1(3), it is stated that "at common law an 'annuity' was yearly sum charged on the person of the grantor; when an annual payment was charged on the land, it was at common law a 'rent charge.'" See article on "ground rent" in 30 C.J.S. 1087-1123, §§1-15, and definition of "ground rent" in 18A Words and Phrases, Perm. Ed., 627 and 628.

Although we are inclined to the view that the reservation of a ground rent in perpetuity to a grantor of such lands, vests an estate in real property in both the grantor and grantee, we are unable to find satisfactory authority that a reservation of an annuity for 99 years in the grantor would vest an estate in real property in both the grantor and the grantee; in fact, we are inclined to the view that such a transaction *would not vest an estate in real property* in the grantor although *such an estate* would appear to be vested in the grantee, subject to a charge on the lands in the nature of an annuity for 99 years.

AGO 064-20, of Feb. 4, 1964, having been prepared and issued on a question of taxation under §7, Art. X, of the State Const., and not on the legality of a reservation of rental to a developer of a condominium, has no effect upon such a reservation of rental, as contemplated by the 1st and 2nd questions above-stated and discussed.

As the said 1st and 2nd questions are questions going to the construction of Ch. 711, F. S., which was derived from Ch. 63-35, we feel that said questions vitally involve the legality of condominium titles created and established under and pursuant to said

statute, which are by their very nature judicial questions, which should be passed on by the courts of this state and not by its attorney general. Only the said courts may furnish a final authoritative answer to the said questions, needed where titles to real property are involved.

064-63—May 18, 1964

COUNTY OFFICERS AND ORGANIZATIONS

ASSIGNMENT OF OFFICE SPACE IN COUNTY COURT- HOUSES—§§5 AND 11, ART. VIII, §19, ART. VI, STATE CONST.; §§2.01, 125.01 AND 125.22, F. S.

To: *Sidney F. Dick, County Assessor of Taxes, Brooksville*
QUESTION:

What person, board, commission, or otherwise, has the jurisdiction and duty to assign and reassign office space in county courthouses where such power or duty is not specifically spelled out by applicable local statutes or laws?

Neither the present constitution nor the statutes of this state specifically set out the manner of assigning office space in the county courthouses, or the officer or officers upon whom is imposed the duty of making such assignments, as well as reassignments when conditions change, that indicate the necessity of making a reassignment of such office space. Present and past constitutions of Florida, as well as the laws relating to the Territory of Florida, clearly show an intention to divide said territory and state into political divisions known as counties. The division of the Territory and State of Florida into counties has ranged from 2 counties at the time of the acquisition of the Floridas from Spain, to the present 67-county division of the state.

"The division of the state into counties had its origin in England, preceding the organization of the kingdom itself, and in the United States counties were first created by the legislatures of the various colonies and subsequently by the state legislatures." (8 Fla. Jur. 147, §2; 14 Am. Jur. 185, §2; 20 C.J.S. 757, §2.) "Government by means of counties has existed in England since an early date, and in all of the United States, with a few exceptions, since their settlement." (20 C.J.S. 757, §2). Counties, therefore, appear to be of common law origin. Although counties in Florida are established and their boundaries changed, and evidently abolished, by legislative action (*Payne v. Washington County*, 25 Fla. 798, 6 So. 881, text same), they are recognized by the State Const., as "legal political divisions of the State; that is, as governmental agencies. They are therefore not of statutory origin." (*Whitney v. Hillsborough County*, 99 Fla. 628, 127 So. 486, text 492).

Boards of county commissioners for the several counties of Florida, except for Dade county (§11, Art. VIII, State Const.) consists of 5 members, one from each of the five county commissioner districts of the county (§5, Art. VIII, State Const.) §19, Art. VI, State Const. of 1868, provided for the appointment by the governor of boards of county commissioners for the several counties of the state, said §19 having contained the provision that "their duties shall be prescribed by law," Florida constitutions of 1845, 1861 and 1865 merely stated that the legislature was authorized to establish in each county a board of (county) commissioners. Ch. 11, 1845, (approved July 26, 1845) provided for the first boards of county

commissioners as such, "consisting of the judge of probate of the county, as chairman ex officio, and four commissioners elected for terms of two years each. These boards of county commissioners were to exercise all the powers and perform all the duties which by the laws of the Territory appertain to the County Courts when sitting for county purposes." Prior to said Ch. 11, 1845, county business was carried on through a so-called *county court* consisting of the judge of the county court and two or more of the justices of the peace of the county, or, in the absence or inability of the judge of the county court, then consisting of three or more of the justices of the peace of the county. (Duval's Digest 275).

There has been little change in the county government plan since it was brought to the American colonies from England where it came down from the remotest period of Anglo-Saxon history. Under this county government plan the board, whether referred to as a board of county commissioners, a county court, or other designation, has operated the county similar in plan to the operation of a business corporation by its board of directors. "Subject to such limitations as may be prescribed by law, a county board ordinarily exercises the corporate and executive powers of the county and manages its affairs." (20 C.J.S. 848, §81).

"Boards of county commissioners are quasi corporations, and their official duties and powers partake more of the characteristics of corporate acts and powers than those of mere trustees." (Martin v. Townsend, 32 Fla. 318, 13 So. 887, text 890, and authorities there cited). Under §125.01, F. S., boards of county commissioners may at any legal meeting make "such orders concerning the care of and the improvement of the corporate property of the county as may be deemed expedient, and also to build and keep in repair county buildings, . . . issue bonds . . . for the purpose of erecting a court house, jail . . . perform all other acts and duties which may be authorized by law." Under §125.22, F. S., boards of county commissioners under the circumstances therein described and set out may lease such space in buildings other than county buildings necessary for the proper transaction of the county business and for the courts as available funds will permit. One of the duties of the boards of county commissioners is "the construction and repair of court houses and jails" to meet the needs of the county, at least to the extent of available funds (Tapers v. Pichard, 124 Fla. 549, 169 So. 39, text 40; Posey v. Wakulla County, 148 Fla. 115, 3 So. 2d 799, text 801).

The history of the ancient county courts of England is traced in II Taylor, Origin and History of the English Constitution, 574 et seq.; one of the duties of that court appears to have been the administration of the business of the county. This appears to have been true as of the date of the settlement of the American colonies. "The common law and statute laws of England which are of a general and not local nature" which are not inconsistent with the State Const. and statutes and laws of Florida, are declared to be in force in Florida by §2.01, F. S. One of the duties of the several boards of county commissioners in this state is the providing of public buildings and keeping the same in repair (§125.01(1), F. S.), including courthouses, jails, etc. Unless otherwise provided by the statutes of this state, the board of county commissioners of the several counties in Florida "in their control over county buildings," and other properties "have the duty, as well as the discretionary power, to designate or appropriate rooms in the county buildings

or elsewhere for the use of county officers. This power is a continuing one, not exhausted by a single exercise, and the assignment of offices may be changed when, in the judgment of the authorities, the public convenience will be promoted by the change, but the exercise of the power is subject to the inherent power of the courts to control court facilities, and to whatever rights and powers are conferred by statute on other county officers." (20 C.J.S. 1001, §169).

When assigning office space in a county courthouse the county commissioners should make an equitable assignment of office space between the several county offices, taking into account the needs of each such officer as well as the available space. The space assigned to each officer should be as compact as possible so that no office will be scattered throughout the building in which assigned. When there is insufficient space for the proper operation of the several offices of the county, so that the space available is limited, the available space should be apportioned among the officers or offices on an equitable basis. The fact that office space may have been assigned when the courthouse or other public building was constructed, or that there has otherwise been a general assignment of the office space in the building, gives to the offices or officers to which assigned no continued and perpetual use of the said office space preventing its reassignment when the equities of the case require reassignment.

064-64—May 19, 1964

SMALL CLAIMS COURT

CONSTRUCTION OF REFERENCE TO PLAINTIFF OR HIS AGENT—MEANING OF TERM "AGENT" IN §42.10, F. S.—§§63.08, 45.01, 42.19; CH. 42, F. S.

To: *Reece Brown, County and Small Claims Judge, Live Oak*
QUESTION:

What construction should be placed on the phrase "the plaintiff or his agent" as used in the second sentence of §42.10(1), F. S., relating to the commencement of actions in small claims courts under Ch. 42, F. S.?

Said §42.10, F. S., provides that actions shall be commenced in the small claims courts under Ch. 42, F. S., "by the filing of a statement of claim including the last known address of the defendant, in concise form and free from technicalities. The plaintiff, or his agent, shall verify the statement of claim by oath or affirmation in the form herein provided, or its equivalent, and shall affix his signature thereto . . ." (Emphasis supplied.) As a general rule, "an agent may be expressly authorized to institute legal proceedings in behalf of his principal, but a mere agent usually has no implied power to institute legal proceedings on behalf of his principal in respect to the subject matter of the agency. The mere fact that an agent has the authority to receive payment does not give him authority to institute legal proceedings by attachment or otherwise, nor does it give him the authority to place a claim in the hands of an attorney for collection . . ." (3 Am. Jur. 2d 494, §92; see also 2 C.J.S. 1338, §116, to the same general effect). Authority to institute or conduct litigation will not be implied from the mere fact of agency, although it may arise from the

facts and circumstances arising from or in connection with such agency.

Generally any person who is *sui juris* may enter his appearance in an action, suit in chancery or other proceeding in court to which he is a party. In such cases the appearance should be by the party himself, or by his duly authorized representative acting for him. (6 C.J.S. 11, §2). An appearance entered in such action, suit in chancery or other proceeding in court, except where otherwise expressly provided by law, should be by the party himself, or through and by his duly authorized attorney at law, and an appearance by any other person is usually held ineffective for any purpose (6 C.J.S. 68, §25). Under rule 1.17, of the Florida Rules of civil procedure every action should be prosecuted in the name of the real party in interest. The provisions of this court rule are substantially the same as were those of former §§45.01 and 63.08, F. S., relating to common law and equity proceedings. Under these statutes and prior similar statutes it was held that an agent may not sue in his own name unless he has a legal interest in the litigation. Mere agency was held not to be such an interest.

In your request for opinion you make reference to credit bureaus, business and credit managers, and employees of the plaintiff, in connection with the provisions of §42.10(1), F. S., where it is provided that "the plaintiff, or his agent shall *verify the statement of claim* by oath or affirmation" in the form provided in §42.19, F. S., "or its equivalent and shall fix his signature thereto." This clearly contemplates that the agent of the plaintiff having knowledge of the correctness and validity of the claim, or the plaintiff himself, verify the same by his oath or affirmation. This statement of claim is and becomes, on its being filed in the small claims court, the complaint in the cause which forms the basis of the trial of the cause. Although the statement of claim may be verified by the said agent of the plaintiff, the action is that of the owner of the claim and not that of the agent, and should be brought in the name of the said owner and not in the name of the agent. (Emphasis supplied.)

We doubt that a credit bureau would be authorized to verify a statement of claim, as the credit bureau as such may not make such a verification, although any officer or agent thereof having knowledge of the same might, if duly authorized by the owner thereof, make such verification and act as his agent. Business and credit managers of the owner of the obligation, as well as any duly authorized agent of his with sufficient knowledge of the facts, may make verification of the claim, and may under the direction of the owner of the obligation act as his agent in the filing of the same in the small claims court. The statute contemplates that the action in the small claims court be filed in person by the owner of the claim, or by his duly authorized agent, or his attorney at law. In either case the action should be filed in the name of the owner of the claim sued on, and not in the name of the agent, although the same may have been verified by the agent.

The above observations seem to answer the above stated question as well as the same may be generally answered.

064-65—May 19, 1964

TAXATION

TAXATION OF LANDS COVERED BY NAVIGABLE WATERS
USED FOR COMMERCIAL PURPOSES—§1, ART. IX, §16,
ART. XVI, STATE CONST.*To: Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are privately owned lands covered by navigable waters subject to ad valorem taxation when used by their owners, or under their authority, for commercial purposes?

This question arises by reason of several boat yards which have been established adjacent to the waters of rivers and other bodies of navigable water in this state. Private lands, or submerged lands purchased from the state, a number of acres in size, have been acquired in or along or near navigable waters, and boat slips or canals have been dredged into the said lands, which have been improved by the construction of piers, docks, sea walls, dry docks, storage sheds and areas, etc., necessary or convenient in the operation of boat factories, storage businesses, repair businesses, and other businesses in connection with boats and vessels. The submerged lands in question are used for commercial purposes by the owners, or under their authority, and not by the general public for purposes of boating, swimming, fishing, and the like.

In *Susquehanna Power Co. v. State Tax Comm. of Maryland*, 283 U.S. 291, text 293 and 294, 51 Sup. Ct. 434, 75 L. Ed. 1042, text 1045, the supreme court of the U.S. held that "lands privately owned are subject to taxation although lying under navigable waters (*Central R. Co., v. Jersey City*, 209 U.S. 473, 52 L. Ed. 896, 28 Sup. Ct. 592; *Leary v. Jersey City*, 248, U.S., 328, 63 L. Ed. 271, 39 Sup. Ct. 115), as is private property in which the federal government may have an interest (*Baltimore Shipbuilding & Dry Dock Co. v. Baltimore*, 195 U.S. 375, 49 L. Ed. 242, 25 Sup. Ct. 50; *New Brunswick v. United States*, 276 U.S. 547, 72 L. Ed. 693, 48 Sup. Ct. 371; *Shaw v. Gibson Zahniser Oil Corp.* 276 U.S. 575, 72 L. Ed. 709, 48 Sup. Ct. 333), or which is subject to its control over navigable waters (*Henderson Bridge Co. v. Kentucky*, 166 U.S. 150, 41 L. Ed. 953, 17 Sup. Ct. 532; *Keokuk & H Bridge Co. v. Illinois*, 175 U.S. 626, 44 L. Ed. 299, 20 Sup. Ct. 205)." See also to the same effect 84 C.J.S. 179 and 180, §69; 51 Am. Jur. 438, §415, at note 15; and 2 *Cooley on Taxation*, 4th Ed., 1320, §625.

Although lands owned by the state and the several counties of the state are by reason of such ownership immune from taxation, in the absence of a statute making such lands subject to taxation (*Park-N-Shop, Inc., v. Sparkman, Fla.*, 99 So. 2d 571, text 573 and 574) lands in private ownership, in the light of §1, Art. IX, and §16, Art. XVI, State Const., are subject to taxation, unless specifically exempted by some provision of the State Const., or are "held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes," said constitutional provisions being limitations upon the power of the legislature to grant exemptions from taxation for purposes other than those mentioned in said constitutional provisions. (See *L. Maxcy, Inc. v. Federal Land Bank*, 111 Fla. 116, 150 So. 248, text 250; *State v. St. John*, 143

Fla. 544, 197 So. 131, text 134; State v. Doss, 146 Fla. 752, 2 So. 2d 303, text 304).

The above question is answered in the affirmative, unless same falls within some constitutional or valid statutory tax exemption provision.

064-66—May 20, 1964

COURTS

COURT REPORTERS—COMPENSATION IN CRIMINAL CASES —§§29.03, 29.04, 43.09, 939.07, F. S.; §14, D. R., §9, ART. XVI, STATE CONST.

To: Betty Gaskin Owens, Official Court Reporter, Wewahitchka

QUESTIONS:

1. What compensation is the court reporter entitled to for reporting criminal proceedings when directed to do so by either the parties or the presiding judge?

2. What agency is responsible for paying such compensation when the circumstances are acquittal, conviction or mistrial?

Section 29.03, F. S., provides as follows:

Compensation for services.—The official circuit court reporter shall be entitled to receive for each day or fraction of a day in which such reporter shall be engaged in reporting testimony and proceedings in any *civil* case not less than ten dollars a day, nor less than ten dollars in any one case, for each day or fraction of a day in which such reporter shall be engaged; and said reporter shall also, when ordered by either party in a *criminal* case or by the presiding judge report the arguments of counsel arguing the facts to the jury, and shall receive as compensation therefor not less than ten dollars for reporting each such argument. Such reporter shall receive for each typewritten transcript of his notes of the testimony and proceedings taken at the trial of any civil or criminal cause, and furnished on demand of either party to the suit for which the testimony and proceedings are taken, the amount of fifty cents per page for the original and the amount of twenty-five cents per page for each carbon copy thereof; and each such transcript page shall consist of not less than twenty-five lines of double-spaced pica typing. Such reporter shall receive the same fees as provided in this section when rendering similar service in criminal or other courts of this state. There shall be no more official circuit court reporters in each judicial circuit than there are circuit judges therein. (Emphasis supplied.)

The above language clearly contemplates that a court reporter receive payment only for a particular criminal case if the arguments of counsel are reported in such case. The provisions for \$10 a day or not less than \$10 a case are only applicable to civil trials and have no application whatsoever to criminal trials. (See AGO 059-119). The next to the last sentence which provides that a reporter shall receive the same fees as provided in this section when rendering criminal or other services in other courts of this state simply means that when the reporter provides services in a civil case in a court other than the circuit court he will receive those fees provided for civil trials, and when a court reporter pro-

vides services in criminal cases in such courts, he will receive only that fee provided for reporting arguments in criminal cases where such service is requested. It is therefore clear that though the next to the last sentence of §29.03, *supra*, extends the right of collecting fees to courts other than the circuit court, such sentence does not provide the reporter with a fee in a criminal case other than that provided for reporting arguments of counsel.

In a criminal case, of course, the court reporter is entitled to receive 50¢ per page for the original and 25¢ per page for each copy of the typewritten transcript made of the proceedings, as is provided by §29.03, *supra*.

The former language of §43.09, F. S. (1961), while not applicable to the question herein involved, in part supports the position herein taken. The pertinent portion of such section is as follows:

Such court reporter, in addition to the compensation for reporting the trial of criminal cases as provided by §29.04 . . . (omitted portion of quote refers to salary for acting as judge's secretary)

Section 29.04, *supra*, simply provides an annual salary for court reporters and makes no provisions for fees in any particular case or for any particular day's work. When such is considered alongside the above-quoted portion of §43.09, *supra*, there is revealed a legislative acknowledgment of intent that the court reporter be compensated for the public function of reporting criminal cases through his annual salary, which is provided for by §29.04, *supra*. If the provisions of §29.03, *supra*, for additional fees in civil cases were applicable to criminal cases, then in those many instances where the county was required to pay the costs of such cases, the reporter in effect would be paid twice by public funds for his public services—once in the form of a salary and a second time in the form of a fee.

The legislature has made generous provisions for the payment of fees in civil cases because the reporting of civil cases is a quasi-private function, not entirely a public one, and therefore an additional fee from the private individuals involved is justified.

With regard to question 2, when a reporter is entitled to a fee in a criminal proceeding for either reporting the arguments of counsel or preparing a typewritten copy or copies of the transcript, such fee shall generally constitute costs in the proceedings.

In cases prosecuted in circuit courts or criminal courts of record, where the defendant is acquitted or discharged without payment of costs on the ground of insolvency, the county in which the crime was committed is made liable for the legal costs. The defendant would be liable for such costs where convicted without adjudication of insolvency. See 9 Fla. Jur., Criminal Law, 285; §14, D. R., State Const.; §939.07, F. S., and §9, Art. XVI, State Const.

In the few cases which have considered the question, it has been held that where, following a mistrial, the defendant was subsequently convicted at a second trial, he was properly taxable with the costs of the original proceeding. *Hill v. State*, Ala. App., 107 So. 789, 65 A.L.R.2d 863; *U.S. v. Hoxie*, 8 Alaska 210; *Nicholson v. State* 157 P. 1013. If, after a mistrial, the defendant is not retried, or is retried and is acquitted, then the costs of the mistrial proceeding must be borne by the county.

Therefore in conclusion and summary it appears that the legislature has viewed the task of reporting criminal proceedings in general as a proper judicial public function of the court reporter's

office, and compensation for such function is provided for through public funds by the payment of the annual salary provided in §29.04, F. S. In addition to such annual salary the court reporter is entitled to at least \$10 for the reporting of arguments of counsel as provided by §29.03, F. S., and for the furnishing of a typewritten transcript. The county is liable for these costs if the defendant is not convicted or is found to be insolvent. If the defendant has been convicted and not found to be insolvent, the defendant himself is liable for such costs.

This office is aware that inequities occur in the salaries of court reporters where certain reporters are required to report predominantly criminal cases; however, the proper solution to such unfortunate circumstances must be provided by a legislative equalization of the fees provided in criminal and civil cases, or by a proper apportioning of criminal and civil cases among various court reporters.

064-67—May 26, 1964

TAXATION

POWER AND AUTHORITY OF PUBLIC OFFICERS TO CANCEL, RELEASE OR COMPROMISE TAXES

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are public officers charged with the administration and enforcement of statutes and laws providing for the assessment and collection of ad valorem taxes in this state authorized and empowered generally to cancel, release or compromise such taxes after the tax rolls become final and are open for collection?

Although we are here concerned directly with the cancellation, release or compromise of an intangible personal property tax imposed on a business corporation domiciled and doing business in this state, amounting to approximately \$550 for the 1962 tax year, the question may well be applicable to ad valorem taxes imposed on real and tangible personal property, as well as such taxes imposed on intangible personal property.

In *St. Lucie Estates, Inc., v. Ashley*, 105 Fla. 534, 141 So. 738, text 739, the supreme court of Florida states that "in its pragmatic application, a tax is not a debt in the ordinary sense of that term, it is not predicated on contract, and can, under no circumstances, be discharged by set-off, counterclaim, or barter, and when legally assessed taxing officers are totally without power to compromise or release it except as specifically authorized by statute, and, when such power is given, it must be rigidly pursued." To substantially the same effect see also 84 C.J.S. 1258, §630. In *State v. O'Quinn*, 114 Fla. 222, 154 So. 166, text 169, doubt is cast on the power of the legislature to provide for the compromise of current taxes, including tax sale certificates less than two years of age, on any basis less than full cash value, the court being of the view that such a compromise would be a legislative function and not that of a public officer, at least in the absence of a legislative formula for such a compromise. In the absence of statutes or constitutional provisions providing therefor tax liens may not be waived, released or abandoned by public officers. (84 C.J.S. 1204, §596).

The above-stated question is answered in the negative, unless

authorized by specific statutory or constitutional provision, or by clear and specific implication of a statute or constitutional provision, nor may a tax lien encumbering specific or particular property be released except when and as provided by statute or constitutional provision.

064-68—May 28, 1964

INSURANCE

AGENT'S COMMISSION—CONTRIBUTION TO NONPROFIT, CHARITABLE ORGANIZATION—§626.0611, F. S.

To: *J. Edwin Larson, Insurance Commissioner, Tallahassee*

QUESTION:

May an insurance agent assign his first year's commissions to a nonprofit, charitable organization?

Section 626.0611, F. S., provides:

626.0611 Rebates and special inducements; life, annuity and disability contracts.—Except as otherwise expressly provided by law, no person shall knowingly permit or offer to make or make any contract of life insurance, life annuity or disability insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereof, or pay or allow, or give or offer to pay, allow, or give, directly or indirectly, as an inducement to such insurance, or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract.

You advise in your letter of inquiry that several insurers contemplate the sale of life insurance policies to the members of a charitable organization, said policies to be sold in such a manner as to permit an income tax deduction with the charitable organization as beneficiary of the policy. Apparently, the agent desires to implement the program and confer further benefit on the charitable organization by contributing his first year's commission on policies sold to members to the association.

Quite clearly the motives and intentions of the agent are meritorious. However, there is serious doubt that such program can be undertaken in view of the clear prohibition against special favors as inducements to purchases of insurance as appears in the above-quoted §626.0611, F. S.

Your question would accordingly be answered in the negative.

064-69—May 28, 1964

PUBLIC OFFICERS

COMPENSATION AS WITNESSES WITHIN PURVIEW OF §902.19(4), F. S.—§§90.14, 90.141, 112.061, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

To what compensation, if any, are public officers within the purview of §902.19(4), F. S., entitled, who appear as witnesses before grand juries and prosecuting officers authorized to file informations?

"Witnesses, in all cases, civil and criminal, in the circuit courts, county courts, county judge's courts, criminal courts of record now or hereafter created . . . shall receive for each day's actual attendance three dollars, and five cents per mile for actual distance traveled to and from the courts. . . ." (§90.14, F. S.). This section appears to fix the compensation of witnesses generally, and in the absence of any other provision, would control the compensation of witnesses appearing before grand juries and prosecuting attorneys making investigations with a view to filing criminal informations charging the commission of crimes.

Section 902.19(4), F. S., provides that "no sheriff, deputy sheriff, constable, deputy constable, highway patrolman, or any person employed or paid by the state or any county thereof as a law enforcement officer, shall be entitled to witness fees or mileage when summoned to testify *in any court sitting in the county in which he holds office, is employed or has his residence.*" This subsection originated as a part of Ch. 19554, 1939. Section 112.061, F. S., as amended by Ch. 63-400, and other acts of 1963, does not within itself make provision for the payment of anything to public officers and employees, or other enforcement personnel, appearing before grand juries and prosecuting attorneys authorized to file informations charging the commission of crimes; however, note §90.141, F. S., providing that, "any law enforcement officer of any municipality, county or the state who shall appear as an *official witness to testify at any hearing or law action in any court of this state as a direct result of his employment as a law enforcement officer* shall be entitled to per diem and traveling expenses at the same rate as provided for state employees under §112.061, F. S." Section 90.141 originated as Ch. 63-508, and appears to have become a law, and to have taken effect on June 18, 1963. (Emphasis supplied.)

Although sheriffs, deputy sheriffs, constables, deputy constables and highway patrolmen, within the purview of §902.19(4), F. S., are law enforcement officers of the state and counties, that does not mean that they are, for that fact alone, within the purview of §90.141, F. S., which, by its terms, applies to law enforcement officers of the state, counties and municipalities, who appear as *official witnesses to testify at any hearing or law action in any court of this state as a direct result of his employment as a law enforcement officer* of the state, or a county or municipality thereof.

First, we are confronted with who is an *official witness* within the purview of said §90.141; this we feel is a witness testifying concerning something or some event with which he has some official connection or is charged with some official duty or obligation in connection therewith. A sheriff would seem to be an official witness when he testifies concerning something with which he has some official connection or growing out of some official act or investigation of his office.

Second, the matters testified about should be something coming to his attention as a direct result of his being employed or holding office as a law enforcement officer; the examples used to illustrate the term "official witness" may be used to illustrate matters of information of a sheriff as a direct result of his official position.

Third, to be within the purview of §90.141, the witness must give his testimony at a hearing or law action in a court of this state. We doubt that the phrase "hearing or law action in any court of this state" should be extended to hearings by or before state,

county or municipal agencies unconnected with the courts of this state. We do not think that the word "hearing" in the phrase "hearing or law action in any court of this state" was intended to be entirely separate and apart from the remainder of the phrase. We are inclined to the view that the word "or" used in the phrase is in the nature of a conjunction and not a disjunction.

A grand jury is an agency of the state and a part of the state judicial system, when acting as a body (*Skipper v. Schumacher*, 124 Fla. 384, 169 So. 58, text 63-64), and has been variously referred to as a coordinate branch of the judiciary (*Cherry v. State*, 6 Fla. 679; *Craft v. State*, 42 Fla. 567, 29 So. 418, text 419 and 420; *Skipper v. Schumacher*, supra), and an arm (*Ryan v. Shaw*, Fla., 77 So. 2d 456, text 457, 48 A.L.R. 2d 713) appendage or adjunct of the court (*Craft v. State*, supra; *State v. Croom*, 48 Fla. 176, 37 So. 303, text 306). We are, therefore, of the opinion that a grand jury in this state is in law a part of the circuit court of the county where sitting, so that proceedings by and before the grand jury are a hearing or action in such court. Although capital cases must be tried on indictment by a grand jury, lesser crimes may be tried in most courts upon information by the state attorney or other prosecuting attorney, as well as on indictment. Such state attorney or other prosecuting attorney, when filing informations as aforesaid, acts in lieu of and in the nature of a one-man grand jury. This being true, an investigation by such a prosecuting attorney, which may lead to the filing of an information, is also a hearing or proceeding in a court of this state.

State, county and municipal law enforcement officers, when summoned to appear before a grand jury or to give testimony before a state attorney, county solicitor, or other prosecuting attorney authorized to file informations charging persons with crimes, to be tried in a court of this state, are official witnesses within §90.141, F. S., when so summoned as a direct result of their employment or official position as law enforcement officers. Where such law enforcement officers appear as official witnesses, as a direct result of their employment or official position, in a court action or proceeding in this state, and give testimony they appear to be within the purview of §90.141, F. S., and may be compensated thereunder.

Section 902.19(4), F. S., is broader in scope than §90.141, F. S., and is not, therefore, repealed thereby except to the extent of the conflict between the two sections. Section 902.19 provides that "no sheriff, deputy sheriff, constable, deputy constable, highway patrolman, or any other person employed or paid by the state or any county thereof as a law enforcement officer shall be entitled to witness fees or mileage when summoned to testify in any court sitting in the county in which he holds office, is employed or has his residence." This section does not seem to extend to municipal law enforcement officers. It relates to sheriffs, deputy sheriffs, constables, deputy constables, highway patrolmen and other law enforcement officers when testifying as such law enforcement officers in the courts of the county of their official residence or employment, duties and obligations. Section 112.061, F. S., as amended, relates to state, county and municipal law enforcement officers who appear as official witnesses and testify, as such official witnesses, in any court of this state "as a direct result of their state, county, or municipal employment or official duties and obligations." (Emphasis supplied.)

To be within the purview of §112.061, F. S., and to be compensated thereunder, state, county and municipal law enforcement officers who testify in any court of this state must be *official witnesses* who testify concerning matters arising as a direct result of their employment or duties as law enforcement officers. "Generally the duties of a public office include those lying fairly within its scope, those essential to the accomplishment of the main purpose for which the office was created, and those which, although incidental and collateral, serve to promote the accomplishment of the principal purposes." (67 C.J.S. 396, §110; Hall v. State, 136 Fla. 644, 187 So. 392, text 398). An official witness testifying concerning matters arising as a direct result of official duties of law enforcement officers, relates to the testifying concerning information by an officer in connection with his administration of enforcement of statutes and laws under which he operates. A sheriff would be an official witness as to all facts and circumstances coming to his knowledge or attention in connection with his enforcement and administration of the statutes and laws under his jurisdiction; the same would be true as to deputy sheriffs, constables, deputy constables, highway patrolmen, and other law enforcement officers. State travel pay is divided into three classes of travel, as defined in §112.061(2), (k) (1) (m), F. S., as amended in 1963. Class "C" travel is defined in paragraph (m) as "travel for short or day trips where the traveler is not away from his official headquarters overnight." Under class "C" travel no per diem is paid, but the traveler receives an allowance for meals as provided in §112.061(5) (b), F. S.; however, "no allowance shall be made for meals when travel is confined to city or town of the official headquarters or immediate vicinity."

Public officers within the purview of §902.19(4), F. S., who are also within the purview of §90.141, F. S., who appear as official witnesses before grand juries and prosecuting officers authorized to file informations, are compensated under §112.061, F. S., as amended, and testify as to matters coming to their attention as a direct result of their being law enforcement officers. It is noted that said §90.141, F. S., also includes municipal officers who do not appear to be within the purview of said §902.19, F. S., and would be compensated under said §90.141. Payments made under and pursuant to §90.141, F. S., as implemented by §112.061, F. S., as amended, would be paid from the same fund as witnesses before grand juries and prosecuting attorneys are now being paid.

064-70—June 1, 1964

TAXATION

CONDOMINIUMS OCCUPYING AIR SPACE ELEVEN OR MORE FEET ABOVE GROUND—TAX STATUS—

§§711.04(1), 711.19; CH. 711, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are condominium parcels, as defined in §711.04(1), F. S., in a condominium building constructed in air space above the surface of the ground by which it is supported, subject to separate taxation under §711.19, F. S.?

A condominium parcel, as defined in §711.04(1), F. S., "is a separate parcel of real property, the ownership of which may be in fee

simple, or any other estate in real property recognized by law." It seems to follow from this provision in §711.04, F. S., that for a condominium parcel to be real property so that its owner will be vested with "an estate in real property recognized by law," the condominium building from which the condominium is derived must likewise be an estate or *interest in real property recognized by law*. It appears from the file handed us with your request for opinion that each and every condominium parcel in the proposed condominium building will be conveyed by the condominium ownership to the condominium parcel owner by warranty deed. This brings us to the question of the status and nature of a parcel of air space, sufficiently described by metes and bounds, located eleven or more feet above the ground or earth, and whether it will constitute an interest in real property, so that condominium parcels conveyed therein will be owned by the condominium purchaser "in fee simple or any other estate in real property recognized by law," within the intent and purview of §711.04(1), F. S., above referred to.

We appear to be here confronted with the question of the right and authority of an owner of a parcel of land, held by him in fee simple absolute, to convey to another "in fee simple, or any other estate in real property recognized by law," that portion of his said real property extending from twenty feet, or other specified distance, above the ground level of his said parcel of land, upward for a specified distance, for the purpose of constructing, within said space from 20 feet upward, and maintaining therein a condominium, within the intent and purview of Ch. 711, F. S., and selling condominium parcels therein as contemplated by said Ch. 711. To conform to the requirements of said chapter such property must "vest in the purchaser a fee simple title or other estate in real property recognized by law," so that the said purchaser will be able to convey to the purchasers of condominium parcels, as defined in §711.04(1), F. S., an estate "in fee simple, or any other estate in real property recognized by law." (Emphasis supplied.)

The statement is made in 2 Tiffany Real Property, 3rd Ed. 624 and 625, §626, that "parts of a building may be owned by different persons in fee simple, as where an upper floor belongs to one person, and the lower to another, or separate rooms, or even parts of rooms, belong to different persons." In 16 Am. Jur. 443, §9, it is stated that "a person who owns the entire estate in real property may sell and convey any part of it. It may be divided horizontally, perpendicularly, or in any manner according to the will of the owner, even to the extent of granting a freehold interest in a part of a building, although conveyances of the latter kind, like leases of apartments in buildings, must be construed according to the intention of the parties and with reference to the subject matter upon which they operate . . ." In 26 C.J.S. 605, §15, the statement is made that a "grantor has the right to divide his holdings by horizontal planes or lateral lines." (Emphasis supplied.)

It is stated in 1 Thompson on Real Property, Perm. Ed., 70, §63, citing *Doe v. Burt*, 1 Term Reports 701, text 703, that "in London different persons have different freeholds over the same spot; different parts of the same house are let to different people. That is the case in inns of court. Now, it would be very extraordinary to contend that if a person purchased a set of chambers, then leased them, and afterwards purchased another set under them, the after purchased chambers would pass under the lease." Like

and similar expressions are found in *Graciosa Oil Co. v. Santa Barbara County*, 155 Cal. 140, 99 P. 483, text 486, 20 L.R.A. (N.S.) 211; *Kidwell v. General Petroleum Corp.*, 212 Cal. 720, 300 P. 1, text 4, 76 A.L.R. 830, *Beulah Coal Mining Co. v. Heihm*, 46 N. D. 646, 180 NW 787, text 789; *Pifer v. Taylor*, 48 N. D. 967, 188 NW 171, text 172; *Harrington v. Watson*, 11 Or. 143, 3 P. 173, text 175; *Hahn v. Baker Lodge*, 21 Or. 30, 27 P. 166, 13 L.R.A. 158, 28 Am. St. Rep. 723; *Pearson v. Matheson*, 102 S. C. 377, 86 SE 1063, text 164 and 165; *Griffin v. Fairmont Coal Co.*, 59 W. Va. 480, 53 SE 24, text 27, 2 L.R.A. (N.S.) 1115; 1 Am. Law of Property, 198-202, §3.10; 4 Powell Real Property, 709 to 711, §§6 and 32; and Washburn on Real Property, §342.

In 73 C.J.S. 194, §13, it is stated that a "landowner owns as much of the air space above the ground as he can occupy or use in connection with the land, and his right generally cannot be abridged. The owner of the surface of land has been said to own to the center of the earth, which ownership cannot ordinarily be interfered with but with respect to ownership below the surface, it has been held that the owner's title does not extend beyond a depth which the owner may reasonably use." It was stated in *Walters v. Sheffield*, 75 Fla. 505, 78 So. 539, text 541, that "by the common law also several sorts of estates or interests may exist in the same fee, as that one person may own the ground or soil, another the structures thereon, another the minerals beneath the surface, and still another the trees and wood growing therein." Permanent and perpetual easements have been recognized (28 C.J.S. 715 and 716, §51). They have been held to be freehold interests (28 C.J.S. 621, §1, note 16). Although perpetual leases are not favored in law, nevertheless where the intention to create one is clear and unambiguous, it will be deemed valid and enforceable. (51 C.J.S. 606, §61). In *State v. Jacksonville Expressway Authority*, Fla., 139 So. 2d 135, it was held that the Jacksonville expressway authority might acquire "easements through the air in perpetuity provided they are found to be adequate and necessary to accomplish the purposes authorized by the expressway statutes.

Where the real property in question is to be located 20 feet or more above the ground, as is contemplated by the above question, the question of ingress, egress and regress, from and to the property, would seem to become a material problem, especially if not provided for by the deed and contract documents by and between the parties to the transaction. Easements and rights necessary for the enjoyment of lands conveyed from an owner to a grantee are deemed by law to pass with the making of a conveyance of land (28 C.J.S. 708-711, §45). Stated another way, where real property is conveyed an easement of ingress, egress and regress necessary for the contemplated use of the property sold arises by implication (28 C.J.S. 695-699, §35). This is especially true where a grantor sells and conveys to a grantee lands entirely surrounded by other lands of the grantor. (28 C.J.S. 699 and 700, §35). It is a general rule that a conveyance of real property carries with it by implication all incidents rightfully belonging to, and essential to the full enjoyment of, such property, at the time of conveyance, including its contemplated use. (26 C.J.S. 902-905, §106). See also 1 Thompson on Real Property, Perm. Ed. 630, et seq., §§390-393; and 17 Am. Jur. 645, et seq., §§37-57.

From the above and foregoing authorities it is evident that where the owner of the fee simple absolute title to a parcel of

real property sells and transfers to another all his right, title and interest in and to that real property lying a specified distance above the level of the ground, for example, all his right, title and interest in said property lying 20 feet or more above the level of the ground, to be used for the construction of a condominium type apartment building, and the sale and conveyance of condominium parcels therein, under, in accordance with, and pursuant to Ch. 711, F. S., there arises an implied grant of a perpetual easement or right to build and install upon the lands retained by the grantor such foundations, footings, and other things necessary, including rights of way for ingress, egress and regress, to permit the construction of the contemplated condominium type apartment building, and its operation as such condominium type building in perpetuity. However, where the parties to such conveyance of real estate interest, lying 20 or more feet above the level of the ground, contract and make provision for such foundations, footings and other necessary things, to run and continue the life of the said conveyance of property lying 20 feet or more above the level of the ground, such agreement would seem to replace and supersede the said implied grant of a perpetual easement above-mentioned.

It is provided in §711.19, F. S., that "property taxes and special assessments assessed by municipalities, counties and other taxing authorities shall be assessed against and collected on the condominium parcels and not upon the condominium property as a whole . . ." The condominium building contemplated by the question herein considered, discussed and determined is within the purview and intent of said §711.19, F. S., so that the condominium parcels therein mentioned are subject to separate taxation under said §711.19, F. S. The above and foregoing question is answered in the affirmative.

064-71—June 4, 1964

REGULATION OF TRADE AND COMMERCE

SECTION 494.08(5), F. S.—RECEIPT OF COMMISSION, BONUS, OR FEE BY PERSONS NOT LICENSED AS MORTGAGE BROKERS—§§494.02(3), 494.08(5), 494.04(1), F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Is it violative of §494.08(5), F. S., for a licensed mortgage broker to pay the costs and fees for a real estate broker to attend a sales course and in exchange for the advancement of such costs, to enter into an agreement with such real estate broker whereunder the real estate broker agrees to refer a designated number of applicants for mortgage loans to the licensed mortgage broker advancing the tuition fee in behalf of the said real estate broker?

2. Is such mortgage broker prohibited from entering into an agreement with the real estate broker whereunder the real estate broker would receive either coupons, stamps, or "bonus points" in exchange for his referral of a mortgage loan transaction to the mortgage broker, where such coupons or bonus points are exchangeable for gifts by the recipient real estate broker?

Presumably, since the real estate broker is not permitted to

solicit mortgage loan transactions, the prospects that he would refer to the mortgage broker would be the persons whom he had encountered in conjunction with his regular business dealings as a real estate broker.

Both of the foregoing questions, while different in form, involve the same principles of law insofar as §494.08(5), F. S., is concerned and accordingly will be treated herein as one.

Section 494.08(5), F. S., provides as follows:

No person not licensed under the provisions of this act shall charge or receive any commission, bonus or fee in connection with arranging for, negotiating, or selling a mortgage loan.

Section 494.04(1), F. S., provides that:

No person shall act as a mortgage broker or mortgage solicitor without a license therefor as provided in this act.

In defining the term "mortgage broker," §494.02(3) states that such term shall mean:

Any person not exempt under §494.03 who for compensation or gain, or in the expectation of compensation or gain, either directly or indirectly makes, negotiates, acquires or sells, or offers to make, negotiate, acquire or sell a mortgage loan. . . .

The above cited statutory provisions contained in the mortgage brokerage act manifestly prohibit a person not licensed as a mortgage broker from receiving any compensation in connection with a mortgage loan transaction. It appears that the proposed costs or tuitions to be advanced by the mortgage broker to the real estate broker and the stamps, coupons, or bonus points proposed to be advanced or credited to the real estate broker in exchange for the referrals clearly confer a benefit upon and serve as an inducement to the real estate broker to refer prospective mortgage loan borrowers to the mortgage broker with whom he has entered into the agreement. In essence, such a device merely affords a finder's fee to the real estate broker and results in compensation being paid him in connection with the negotiation of a mortgage loan. Such a result would be contrary to the prohibitions contemplated by §494.08(5), F. S.

Accordingly, both questions are answered in the affirmative.

064-74—June 17, 1964

COUNTY PUBLIC SCHOOL PERSONNEL

CONTINUING CONTRACTS—COUNTY SUPERINTENDENTS —§231.36(4), F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

QUESTIONS:

1. Would a person who is serving as a county superintendent and who held a continuing contract with the county at the time he assumed the duties of county superintendent be entitled to return to his continuing contract position on expiration of his term of office?

2. Since §231.36(4), F. S., permits a county board, at its discretion, to grant a person who has served as county superintendent a continuing contract as a class-

room teacher, could this law be construed to allow a county board to grant a superintendent a continuing contract as a principal or supervisor if he has already served the required probationary service in the position?

Section 231.36(4), F. S., provides:

The county board of public instruction of any given county may, at its own discretion, grant to a person who has served as county superintendent of public instruction in that county, at the completion of his service as superintendent, a continuing contract as a classroom teacher. Service as superintendent shall be construed as continuous teaching service in the public schools of this state.

In view of the above, both questions 1 and 2 are answered in the affirmative.

064-75—June 18, 1964

COURTS

AUTHORITY OF SMALL CLAIMS COURT TO ACQUIRE JURISDICTION OVER PERSONS OUTSIDE FLORIDA—

§§42.10, 48.13, F. S.; §6(3), ART. V, STATE CONST.

To: Cecil R. Rosier, Judge, Brevard County Small Claims Court, Cocoa

QUESTIONS:

1. May a Florida small claims court acquire jurisdiction by registered or certified mail over a defendant who resides in another state?
2. May a small claims court acquire jurisdiction over a defendant by registered or certified mail where the letter containing the statement of claim and notice of hearing was mailed to a Florida address but the return receipt shows that the defendant received said mail outside of the state?

AS TO QUESTION 1:

At the outset it should be pointed out that jurisdiction of a court may be divided into three categories: (1) in personam, (2), quasi in rem, and (3) in rem jurisdiction. The type of service of process and the facts and circumstances of each case will determine just what type of jurisdiction a court has in a given instance.

A small claims court can never have greater jurisdiction than the several circuit courts of the state as regards nonresident defendants. The circuit court is the fundamental court of general jurisdiction. See Florida Const., §6(3), Art. V. Therefore, it would seem to follow that where the circuit court's jurisdiction ceases so does that of the small claims court. In AGO 055-165, p. 221 of the 1955-56 biennial report of the attorney general, it was concluded that "Service by mail cannot be called personal service." Service by mail is "constructive service." See generally Ch. 48, F. S., and in particular §48.13, F. S. Chapter 48 applies to circuit courts and as mentioned above, small claims courts can have no greater jurisdiction than circuit courts. Constructive service (service by mail) can only bring nonresidents within the jurisdiction of a court where there is a res in the control of the court, and then only for the sole purpose of adjudicating their rights, if any, to the res. First Nat'l Bank of Rome, Ga., v. First Nat'l Bank of Jasper, Fla., C.C.A.,

264 F. 83, cert. granted 254 U. S. 622, 41 Sup. Ct. 7, 65 L. Ed. 443; affirmed Bank of Jasper v. First Nat'l Bank of Rome, Ga., 258 U. S. 112, 42 Sup. Ct. 202, 66 L. Ed. 490. Constructive service is not intended to be applied to bring a defendant into court for the mere purpose of collecting a personal claim. *Ake v. Chancey*, 152 Fla. 677; 13 So. 2d 6. The court in this case said at p. 9:

We find nothing in the 1941 Constructive Service Statute to show that it was intended to be employed to bring a defendant into court for the mere purpose of collecting a personal claim and the cases relied on by appellee do not show that constructive service can be substituted for personal service in such cases. The courts generally hold that suits to collect personal claims cannot afford a basis for constructive service. . . .

The constructive service statute has not been materially changed since 1941.

In addition I would direct your attention to 9 Univ. of Fla. Law Review 33, 39, where service of process of small claims courts is discussed. There it is said:

The section (§42.10, F. S.) contains authority for service on defendants by registered mail. This process runs throughout the state *but, of course, not outside the state* . . . (Emphasis supplied.)

citing AGO 055-336, p. 437 of the 1955-56 biennial report of the attorney general.

In summary then question 1 is answered as follows: A small claims court can never acquire in personam jurisdiction over a nonresident defendant by registered or certified mail (constructive service). If such defendant has any property in Florida, real, personal, or a debt owing to him, then attachment or garnishment thereon would permit a small claims court to assume jurisdiction. This would give the court *in rem* or *quasi in rem* jurisdiction over the property of the nonresident defendant. Of course, registered or certified mail should then be employed to give said defendant notice and an opportunity to defend *his rights in that property*.
AS TO QUESTION 2:

As to question 2, if the defendant is a nonresident the foregoing would be equally true. If the defendant is domiciled in Florida then the fact he received the registered letter outside the state would not appear to be fatal. Jurisdiction of the court could rest just as well on *domicile in Florida*. In such an instance this office is inclined toward the position that jurisdiction would be acquired. Care should be urged even in this instance as well as in all instances where registered or certified mail is employed for service of process, that every term of the statute is strictly followed for the courts do not hesitate to quash same for mere technical error.

064-76—June 19, 1964

REGULATION OF TRADE AND COMMERCE

REVOCATION OR SUSPENSION OF FOOD OR LODGING
ESTABLISHMENT LICENSES—MUNICIPAL CONVICTION
§§509.241(3), 509.261(4)(a), 796.07, 165.19, F. S.*To: Robert A. Riedel, State Hotel & Restaurant Commissioner,
Tallahassee*

QUESTIONS:

1. Under the constitution and laws of Florida, does the commissioner have authority to revoke or suspend the license of a public lodging or food service establishment where a conviction of an interested person as defined under §509.261(4)(a), F. S., was obtained in a municipal court based on a municipal ordinance making it a violation of a municipal ordinance to violate §796.07, F. S.?

2. Where an applicant to this commission for a license to operate a public lodging or food service establishment has been convicted in a municipal court of violating the same statute which is set forth in question 1 above, does this commission have authority to deny such applicant a license solely on the ground that he has been convicted of violating said city ordinance?

You indicate that municipalities have adopted ordinances either pursuant to §165.19, F. S., or under the provisions of their municipal charters making it an offense against municipal laws to commit certain acts that presently constitute an offense against state laws.

It is presumed for the purposes of this inquiry that municipalities are authorized to adopt such ordinances and that the same constitutes a valid exercise of the police power of the municipality.

In particular you refer to the adoption of a city ordinance containing substantially the same provisions as those contained in §796.07, F. S., relating to the crime of prostitution.

You inquire whether a conviction in municipal court, pursuant to a municipal ordinance, of those activities which are, in addition, a violation of §796.07, F. S., form the basis for you to revoke, suspend or deny the issuance of a license to operate a public lodging or food service establishment in view of the provisions of §§509.241(3) and 509.261(4)(a) which provide in part as follows:

509.241 Licenses required; public lodging and food service establishment.—

* * *

(3) Licenses; annual renewals. — . . . The commissioner may refuse a license, or a renewal thereof, to any establishment that is not constructed and maintained in accordance with the law and rules and regulations of the hotel and restaurant commission . . .

509.261 Revocation or suspension of licenses; fines; procedure. —

* * *

(4) In addition to the grounds of revocation or suspension as set forth in this section, the hotel and restaurant commission may suspend or revoke the license of any public lodging or public food service establishment in accord-

ance with the requirements of this section and §§120.20 through 120.28, when:

(a) Any person interested in the operation of any such establishment, whether owner, agent, lessee, or manager, has been convicted within the last five years in this state or any other state or the United States of soliciting for prostitution, pandering, letting premises for prostitution, keeping a disorderly place, illegally dealing in narcotics, or any other crime involving moral turpitude. The term convicted shall include an adjudication of guilt on a plea of guilty or nolo contendere or the forfeiture of a bond when charged with a crime. (Emphasis supplied.)

A reading of the provisions of §509.261(4) indicates that the grounds for revocation or suspension are predicated upon the conviction of a "crime." In particular, the reference to conviction of "soliciting for prostitution, pandering, letting premises for prostitution," etc., followed by the phrase "or any other crime involving moral turpitude" indicates that said subsection contemplates conviction of a "crime." (Emphasis supplied.)

Whether the conviction of violating a municipal ordinance constitutes a "crime" was discussed in *Roe v. State*, 119 So. 118 at p. 121 as follows:

It appears that the weight of authority is quite well settled to the effect that, in order for a conviction of crime to be admissible as affecting the credibility of a witness, it must be a conviction of an offense against "the law of the land"; that no offense is a crime, as used in this sense, which does not violate the law of the land; and it is well established that a conviction for a violation of a municipal ordinance does not come within this category and is not admissible as affecting the credibility of a witness . . .

Nor is the mere fact that the violation of a municipal ordinance was based upon facts which also constituted a violation of a state criminal statute considered sufficient. It must be a conviction of a crime, in violation of a law of the state — a case wherein the prosecution runs in the name of the state. . . . (Emphasis supplied.)

In *Boyd v. County of Dade*, 123 So. 2d 323, the supreme court of Florida cites many decisions holding that violation of local laws, ordinances or regulations does not constitute a crime. (123 So. 2d at pp. 329, 330.)

In view of the fact that §509.241(4)(a) predicates suspension or revocation of a public lodging or public food service license upon the conviction of a "crime" and in light of the decisions of the highest court of this state concluding that violation of "municipal ordinance" does not constitute a crime, it is my opinion that your questions must be answered in the negative.

In addition, it is to be noted that under the provision of §509.241(3), supra, renewals may be refused by the commission where an establishment has not been "constructed or maintained" in accordance with the rules and regulations of the commission. While a renewal may be refused for the violation of certain rules and regulations of the commission, there is serious doubt, under the language of said section, that the commission could adopt a regulation predicated upon the conviction of a municipal ordinance as a basis for refusal to renew. It is suggested, in those cases where

the offense is in violation of state law as well as municipal ordinance, that the matter be referred to the state attorney for possible prosecution.

064-77—June 18, 1964

CRIMINAL PROCEDURE

PUBLIC DEFENDER—CONSTRUCTION OF CH. 63-409, LAWS OF FLORIDA, (PART II, CH. 27, F. S.) RELATING TO CERTAIN DUTIES OF SAID OFFICER—§§2(1), (3), 3(1), CH. 63-409; §§775.10, 775.11, 924.17, F. S.

To: R. A. Green, Jr., *Public Defender, Starke*

QUESTIONS:

1. Does §2(1), Ch. 63-409 make it the duty of the public defender to (a) represent insolvent probationers at probation revocation hearings? (b) represent insolvent parole violators at parole revocations hearings? (c) represent insolvent prisoners on their appeal from a denial of their motion to vacate and set aside the judgment sentence of rule No. 1, Florida rules of criminal procedure? (d) to represent insolvent prisoners on habeas corpus petition or an appeal from the denial of such a habeas corpus petition? (e) offer free legal counsel to state prisoners and the general public on noncriminal matters?
2. Does §2(3), Ch. 63-409 permit the public defender to file, etc., habeas corpus petitions as private civil practice?
3. Would §3(1), Ch. 63-409 permit the public defender to subpoena witnesses to testify regarding the solvency of a defendant before the public defender in preparation for a report to the trial court, and if so would it be proper to go into other matters with these witnesses during such proceedings?
4. If it is ruled that the public defender is charged with the responsibility of taking appeals from the denial of collateral attacks, is the defender required to file an appellant brief citing grounds that he feels, in his professional opinion, are frivolous and unfounded, and if not what is the proper manner in which to handle such cases?
5. Assuming the defender is charged with the responsibility of taking direct appeals from convictions, does the defender have discretion as to whether such appeal is well-founded and hence should be taken, and if not what is the proper method of entering an appeal where errors assigned, would be, in the defender's opinion frivolous and unprejudicial to defendant?
1. Section 2(1) of Ch. 63-409, now part II of Ch. 27, F. S., prescribing the duties of the public defender reads as follows:
 - (1) The public defender shall represent any person who is determined to be insolvent as provided in this act, who is under arrest for, or is *charged with*, a noncapital felony if such person requests it or if the court, on its own motion, so orders and such person does not knowingly, understandingly, and intelligently waive the opportunity to

be so represented. The clerk of the court conducting such proceedings is directed to make such proceedings a matter of record. (Emphasis supplied.)

(a) In the case of *Willie C. Thomas v. State*, decided by the district court of appeal for the third district on Apr. 28, 1964, not yet reported, said court expressed the opinion that a denial of court-appointed counsel at a probation violation hearing would not afford a basis for relief under criminal procedure rule no. 1.

Nevertheless, it is my opinion that a defendant is still "charged with" an offense at the time he is given a probation violation hearing, within the contemplation of the above-quoted statutory subsection, and therefore I think that it is as much the duty of the public defender to represent an insolvent defendant at such a hearing in a noncapital felony case as it is to represent such defendant at his trial.

In this connection, I have the impression that in most instances where courts revoke probation, they proceed forthwith to impose sentences, and I call attention to the decision rendered by the district court of appeal for the second district in the case of *Fred Lee Evans v. State*, under date of May 6, 1964, not yet reported, wherein that court said: "We conclude that due process of law requires that an insolvent defendant in a felony case be represented by legal counsel at the time sentence is imposed upon him."

(b) A parole violation hearing is no part of the prosecution against the parolee. It is an independent, collateral proceeding. A parolee is not "charged with" a crime within the purview of the said public defender law when he is charged with violating the terms of his parole and given a hearing on such charge. Therefore, I am of the opinion that no duty rests upon the public defender to represent any defendant at such a hearing.

(c) It is my opinion that a prisoner who files a motion to vacate under criminal procedure rule no. 1 is no longer "charged with" a crime within the contemplation of the public defender law; he is past that stage; his motion to vacate is not a part of the criminal proceedings; it is an independent, collateral civil proceeding. Therefore, the public defender has no duty to represent a movant under criminal procedure rule no. 1 in either the trial court or on appeal from an order denying his motion to vacate.

(d) An attorney who accepts employment to represent a person charged with a noncapital felony usually institutes a habeas corpus suit, before conviction, as a part of his employment when it appears needful to do so in order to adequately protect the substantial rights of his client. Examples of situations in which this is done include (1) where the defendant is unable to post bail in the amount required by the trial court and counsel considers that such amount is excessive under the circumstances; and (2) where counsel considers that the statute under which the prosecution is laid is unconstitutional and that, under the circumstances which exist, the best interests of his client require the institution of a habeas corpus action challenging the constitutional validity of such statute.

Likewise, I think that the public defender who represents an insolvent defendant should institute a habeas corpus proceeding in the event that a situation arises before conviction which leads such public defender to conclude that it is necessary to do so in order to adequately protect the substantial rights of such defendant,

and should take an appeal if an adverse order is entered by a court from which an appeal will lie.

It is not the duty of a public defender to institute a habeas corpus proceeding in behalf of an insolvent defendant who has been convicted and is in custody under a sentence of imprisonment.

(e) Chapter 63-409 imposes no duty upon a public defender to offer or furnish free legal counsel to state prisoners or to the general public on noncriminal matters.

2. I assume that this question has reference to habeas corpus actions in behalf of persons serving sentences of imprisonment.

In AGO 063-81, rendered by my immediate predecessor in office under date of July 22, 1963, he made the following statement with reference to said §2(3):

It is my opinion that by enacting said statutory provision, the Legislature intended to prohibit a Public Defender from engaging in the practice of criminal law otherwise than in his official capacity as Public Defender.

In *Snell v. Mayo*, 80 So. 2d 330, the question involved was as to whether Snell had 90 days or only 60 days in which to appeal from an order denying the petition for writ of habeas corpus which he had filed in an effort to procure his release from prison. He filed his notice of appeal more than 60, but less than 90 days after the entry of said order. The appeal was taken too late if the 60-day appeal period allowed in civil cases was applicable. In holding applicable the 90-day period fixed by §924.09, F. S., for taking an appeal in a criminal case, the supreme court said:

Appellee has filed a Motion to Dismiss the appeal in the instant case, which was taken by appellant from an order entered in habeas corpus proceedings instituted by him in the court below to secure his release from the custody of the appellee, as Prison Custodian of the State of Florida. . . .

* * *

. . . While it well may be that, as to habeas corpus proceedings which are not concerned with obtaining release from custody by one who is being held on a charge or conviction of violating the criminal laws of this state, such proceedings might be considered "civil rather than criminal in nature," there can be no doubt that as to habeas corpus proceedings of the type with which we are here concerned the appeal must be prosecuted in accordance with the statute adopted in 1939 relating to appeals in criminal cases, Chapter 924, Fla. Stat. 1953, F.S.A. . . .

* * *

Since the appeal in the instant case was filed within ninety days of the date of the entry of the order appealed from, as provided by Section 924.09, Fla. Stat. 1953, F.S.A., it was timely filed, and the appellee's Motion to Dismiss is, therefore, denied.

Since it thus appears that our supreme court has ruled that a habeas corpus proceeding instituted for the purpose of procuring release from confinement under a sentence imposed in a criminal case is criminal in nature and that an appeal in such a case is governed by the provisions of Ch. 924, F. S., relating to appeals in criminal cases, (which provisions are consonant with the rules relating to criminal appeals which are contained in the Florida appellate rules), and since a public defender is not authorized to

practice criminal law except in his capacity as public defender, I do not think that a public defender has the right to handle, as a part of his private civil practice, habeas corpus actions in behalf of prisoners confined under sentences imposed in criminal cases.

3. Section 3(1) of said Ch. 63-409 provides as follows:

(1) The determination of insolvency of any accused person shall be made by the court and may be done at any stage of the proceedings. The Public Defender shall be allowed process of the court to summon witnesses to testify before the court concerning the financial ability of any accused person to employ counsel for his own defense.

Said section goes no further than to allow a public defender the process of the court to summon witnesses to testify before the court concerning the financial ability of the accused person to employ his own counsel. It does not permit the public defender to have witnesses summoned before himself for any purpose. When witnesses are summoned before the court pursuant to said statutory authorization, it is not proper for the public defender to interrogate them about any matter except the financial ability of the accused person to employ his own counsel.

4. As above indicated, I am of the opinion that the public defender has no responsibility for taking appeals from orders denying collateral attacks under criminal procedure rule no. 1 proceedings, and therefore it would not be worthwhile to discuss what grounds he should rely on in a brief on such an appeal.

As further indicated above, the only other appeals which I think the public defender has the duty to take from orders denying collateral attacks, and the circumstances under which they should be taken, are discussed in my answer to question 1, (d), supra, relating to habeas corpus actions before conviction and appeals therein, and it is therefore not necessary to deal with them further at this point.

5. Your statement of this question assumes that the public defender is charged with the responsibility for taking appeals from convictions of insolvent defendants. There has been no Florida court decision on this point.

However, I understand that said public defender law was enacted, at least in large part, as the direct result of, and presumably to set up a means of providing the legal representation of insolvent defendants required by, the U. S. supreme court's decisions of Mar. 18, 1963, in *Gideon v. Wainwright*, 9 L. Ed. 2d 799, which held that an indigent defendant charged with a noncapital felony has the constitutional right to be furnished counsel to represent him in the trial court, and *Douglas v. California*, 9 L. Ed. 2d 811, which held that an indigent defendant convicted of a noncapital felony has the constitutional right to have counsel furnished, upon his request, to represent him in appealing from his conviction. Also, I observe that in *Joyner v. State*, 30 So. 2d 304, where the supreme court of Florida was dealing with the question of whether a person may lawfully be convicted of being a fourth felony offender under §§775.10 and 775.11, F. S., when he has an appeal pending from his fourth conviction, said court ruled that:

... If an appeal has been taken from a judgment of guilty in the trial court that conviction does not become final until the judgment of the lower court has been affirmed by the appellate court. . . .

The judgment of conviction referred to in the informa-

tion as the fourth conviction of a felony was at the time of the filing of the information, and at the time of the trial, not final and effective. . . .

Since, in view of the legal situation which existed when the public defender law was enacted, it is reasonable to conclude that at least a part of the legislative purpose was to provide the legal representation on appeal required by the decision in the Douglas case, *supra*, and since the supreme court of Florida has said that where an appeal is taken from a criminal conviction, the conviction is not final until it is affirmed on appeal, I consider it also reasonable to conclude that when an appeal is taken from a conviction, the defendant remains "charged with" the offense until his conviction is affirmed on appeal or his appeal is dismissed by the appellate court. Consequently, I agree with your assumption that it is the public defender's duty to represent an insolvent defendant on appeal from his conviction for a noncapital felony, when requested to do so by such defendant or when directed to do so by the court.

When, within the time allowed by law for appealing, an insolvent defendant requests the public defender to represent him in taking an appeal from his conviction of a noncapital felony, I think that the wisest course for the public defender to follow would be to promptly file a notice of appeal, serve a copy on the prosecuting attorney, procure and file the affidavit of insolvency and procure an order of insolvency pursuant to §924.17, F. S., even though he then thinks that the appeal is without merit. The final determination of whether the appeal has or does not have merit should be made by the appellate court, not by the public defender.

A public defender should never conclude that an appeal is completely lacking in merit unless he has first carefully studied the case from every angle. He owes it to the defendant and to himself to do this. He may do the defendant an injustice if he incautiously pronounces that the appeal is without merit. If he mistakenly brands an appeal as frivolous, he will be keenly embarrassed and his professional reputation will be diminished in the event that another lawyer takes over the case and succeeds in procuring a reversal.

However, if a public defender arrives at the firm and studied conviction that there is no arguable point of even colorable merit which can be assigned as error, I suggest that, after filing a notice of appeal, serving a copy thereof upon the prosecuting attorney, and procuring an order of insolvency for appeal purposes under §924.17, F. S., the wisest course to pursue might be to file a motion in the appellate court requesting that he be relieved of responsibility for the further handling of the appeal and, to safeguard the appealing defendant's rights, requesting that the appellate court allow adequate additional time for the filing of assignments of error and directions to the clerk and for the preparation and filing of the appeal record. Any such motion should show good cause why the public defender ought to be so relieved. Copies of the motion should be served upon the appealing defendant and the attorney general.

064-78—June 18, 1964

PUBLIC RECORDS—PRIVACY**HOSPITAL RELEASE OF INFORMATION CONCERNING
DEATH OF PATIENTS—§398.18(1), F. S.**

*To: E. William Crotty, Counsel for Halifax District Hospital,
Daytona Beach*

STATEMENT OF FACT:

The hospital board has been requested by a local newspaper to permit access to hospital records with respect to the deaths of patients in the hospital for the purpose of permitting the newspaper to publish obituaries and other news items within a timely period following said deaths. There is a delay of 48 to 72 hours from the time of death until the death certificates are filed of record and by the time the certificates have been filed, the information is no longer timely. The newspaper feels that the information is a matter of public interest which should be released promptly.

QUESTION:

May the hospital release information of this nature to the newspapers prior to the filing of the death certificates for record?

The answer to your question hinges upon whether the hospital would be liable for an invasion of privacy if it released the information to the newspaper.

The right of privacy is a purely personal action, and does not survive, but dies with the person. *Melvin v. Reid*, 112 Cal. App. 285, 297, P. 91, 92, 1931. See also *Metter v. Los Angeles Examiner*, 95 P. 2d 491, which denied recovery in an action by a husband for the publication of a picture of his deceased wife in connection with a news story of her sensational suicide.

The right of privacy has been defined as "the right to be let alone." (Cooley on Torts, 2d Ed., p. 29, quoted in *Cason v. Baskin*, Fla. 20 So. 2d 243).

The only matter to be considered, therefore, in connection with the publication of the name of a deceased person is whether any person other than the deceased could maintain an action for invasion of privacy based upon the publication of the fact that a named individual has died and that the name of the individual and other pertinent data to be recorded in an official death certificate is made available for publication in advance of the actual filing of the death certificate as a public record.

The rights of privacy must be accommodated to freedom of speech and of the press and to the right of the general public to the dissemination of information. (*Harms v. Miami Daily News, Inc.*, Fla., 127 So. 2d 715).

In *Firth v. Associated Press*, 176 F. Supp. 671 at 674, it was held that the two primary limitations placed on the right of privacy are publications of public records and publications of legitimate or public interest. In *Patterson v. Tribune Co.*, 146 So. 2d 623 at 626, it was held that not all public records were subject to publication since public policy requires that some records, although of a public nature, be kept secret and free from public inspection. Involved in the *Patterson* case, *supra*, were records of narcotics commitment, the publication of which was implicitly prohibited by §398.18(1),

F. S. The court in the Patterson case recognized that except for the exception noted, public records are subject to publication.

In *Cason v. Baskin*, supra, at 251, the supreme court of Florida, quoting from 41 Am. Jur. 934, said:

The right of privacy is relative to the customs of the time and place, and it is determined by the norm of the ordinary man. The protection afforded by the law to this right must be restricted to "ordinary sensibilities," and cannot extend to supersensitiveness or agoraphobia. In order to constitute an invasion of the right of privacy, an act must be of such a nature as a reasonable man can see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence, situated in like circumstances as the complainant; and this question is to some extent one of law.

Therefore, I am inclined toward the position that the release of information with respect to the deaths of patients usually does not constitute a violation of the right of privacy of anyone else. I base this conclusion on the fact that: (1) The information is of public benefit, in which the public has a rightful interest; (2) The same information is contained on the death certificate, which instrument is a public record; and (3) The information usually contained in a newspaper obituary is not such that a reasonable man would anticipate that its dissemination would cause mental distress and injury to one possessed of ordinary feelings and intelligence.

The hospital owes two duties to the living relatives in the immediate aftermath of a death in the hospital. First, a proper death certificate must have been signed by a licensed physician. Second, the hospital administrator or other agent of the hospital board should determine that there are no circumstances of the death itself which would be apt to cause mental distress and injury to the members of the immediate family of the deceased.

Publication of information concerning the death of a patient might, in certain circumstances, be actionable. For instance, to release for publication the fact that a person died from a loathsome disease might overstep the bounds of propriety and thus constitute an invasion of privacy of a close relative.

Subject to these observations, however, the hospital may release information of the established death of a patient after a death certificate has been signed and prior to its having been filed of record.

064-79—June 24, 1964

BANKS AND BANKING

BANK CLOSING ON MONDAY FOLLOWING HOLIDAY ON PREVIOUS SATURDAY—§§683.01-683.06, 659.271, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a holiday falls on a Saturday, when a bank or banks are regularly closed on Saturdays, may banks treat the following Monday as a legal holiday and remain closed?

Sections 683.01 and 683.02, F. S., specify the regular holidays observed in Florida, with certain other holidays being mentioned in

§§683.03, 683.04, 683.05 and 683.06, of the said statutes, there being included in said holidays independence day, or July 4. July 4, 1964, will fall on a Saturday, which day is designated by said §§683.01 and 683.02, F. S., as a legal holiday; the question herein considered poses the question of whether or not July 6, 1964, being the following Monday, may be taken and considered as a holiday to be observed by banks which are regularly closed on Saturdays. It is provided in and by §683.01(2), F. S., that "whenever any legal holiday shall fall upon a Sunday, the Monday next following shall be deemed a public holiday for all and any of the purposes" mentioned in §683.01(1). This would not include a Monday following a Saturday.

Although §659.271, F. S., appears to permit bank closings on a Wednesday, Thursday or Saturday under the circumstances and conditions therein mentioned, said section makes no provision for a closing on Mondays. We do not think that the following Monday, following a holiday falling on the previous Saturday, may be deemed a holiday instead of a business day in the absence of a statute so providing in this state. We find no authority vested in the comptroller which would seem to permit him by rule, proclamation or otherwise to declare such a Monday to be a holiday in lieu of one falling on a Saturday.

The above question is answered in the negative.

064-80—June 24, 1964

PUBLIC HEALTH

WATER SYSTEMS, SUBDIVISIONS—NECESSITY FOR APPROVAL BY STATE BOARD OF HEALTH— §§381.271, 205.64, F. S.

To: *Wilson T. Sowder, State Health Officer, Jacksonville*
STATEMENT OF FACT:

The developer of a subdivision opened four artesian wells approximately 250 feet deep, each well equipped with a 500 gallon pressure tank. Plastic pipe of 2 in. in diameter was installed on 5 ft. easements and each property owner is allowed to connect to same if he desires. No charge is made for the water used, but each property owner pays a share of the maintenance and electrical cost incident to operating the water system. Each well serves approximately 21 lots. In the lot sales, no representation is made that water supply is available, and each purchaser is permitted to make his own arrangements as to water, either by shallow well and pump on his own lot or by use of the artesian water.

QUESTION:

Is it necessary for a person who makes available or provides a water supply under the above circumstances to obtain the approval of the state board of health as provided in §381.271, F. S.?

Section 381.271, F. S., provides as follows:

381.271 Approval of water.—No county, municipality, person, persons, firm, corporation, company, *public or private* institution or community of more than twenty-five inhabitants shall install a *system of water supply*, . . . or materially alter or extend any existing system until complete plans and specifications for the installation, alterations or extensions, together with such other information

as the board may require have been submitted and approved by the board. The board may further make and enforce such specific rules and regulations regarding the submission of plans for approval and record as it deems reasonable and proper to carry out the provisions of this section. (Emphasis supplied.)

Pursuant to the above-quoted authority, the Florida state board of health adopted Ch. 170C-1, rules of the said board, relating to water, which defines a "public water supply system" in §170C-1.01(1) as "a system serving more than twenty-five persons or otherwise making water available to public groupings or the public in general." Section 170C-1.04 of said rules provides that "no person, persons, firm, corporation, company, institution, municipality or community shall install, extend or alter any public water supply system without first having received written approval of the Board."

Section 205.64, F. S., which provides a license tax to be paid by each person engaged in the business of operating water companies, provides in the last paragraph thereof as follows:

For the purpose of this section, any person furnishing water for profit shall be construed to be a water company; provided that persons having wells for private use, and who may furnish not more than twenty-five neighbors with water, shall be exempt from the provisions of this section. (Emphasis supplied.)

In view of the foregoing statutes and rules of the Florida state board of health, it appears that if the developer furnished water to more than 25 persons, or otherwise makes water available to public groupings, it is necessary for him to obtain the approval of the Board as provided in §381.271, F. S., supra.

Your question is answered accordingly.

064-81—June 29, 1964

NOTARY PUBLIC

FEEES TO BE CHARGED BY NOTARY PUBLIC AS SUCH BY EMPLOYEE OF OFFICE OF CLERK OF CIRCUIT COURT AS DISTINGUISHED FROM FEE TO BE CHARGED AS DEPUTY CLERK—DISPOSITION—§§28.06, 28.24, 117.01, 117.03-117.05, 90.01, F. S.; §15, ART. XVI, STATE CONST.

To: Ernest Ellison, State Auditor, Tallahassee

QUESTIONS:

1. May the clerk authorize a notary public to perform such services as a notary public in the clerk's office?
2. If the answer to question 1 is affirmative, may the clerk pay as an expense of the office the expenses of the notary public in obtaining his commission and seal?
3. If the answer to question 1 is affirmative, may the notary public charge a notarial fee prescribed in §117.05, F. S., for such services, or should he charge the fee for oath prescribed in §28.24, F. S., for the clerk?
4. If the answer to question 1 is affirmative, are the fees of the notary public for such services personal to the notary public, or are they income of the office of the clerk?

5. Is the answer to any of the above questions affected by the fact that the notary public is a deputy clerk or an employee of the clerk?

AS TO QUESTION 1:

A notary public in Florida is appointed by the governor, to hold office for 4 years and shall use and exercise this office of notary public for such places and within such limits and precincts as the governor shall direct (§117.01, F. S.).

Notaries public are authorized, among other things, to take acknowledgments of deeds and other instruments of writing and to administer oaths and make certificates thereof (§117.03, F. S.), and to acknowledge deeds and other instruments of writing for record as fully as other officers of this state may do (§117.04, F. S.).

A notary public is recognized as a state officer under §15, Art. XVI, State Const. See AGO 043-337, p. 172.

Both clerks of the circuit court and notaries public may take and administer oaths, affidavits and acknowledgments required or authorized under the laws of this state. The jurat or certificate of proof or acknowledgment shall be authenticated by the signature and official seal of such officer or person taking or administering the same, but when taken or administered before any clerk or deputy clerk of a court of record, the seal of such court may be affixed as the seal of such officer or person (§90.01, F. S.).

The clerk of the circuit court may appoint a deputy or deputies, for whose acts he shall be liable and the said deputies shall have and exercise each and every power of whatsoever nature and kind as the clerk himself may exercise, excepting the power to appoint a deputy or deputies (§28.06, F. S.).

Thus a notary public is an officer of the state, just as the clerk of the circuit court is an officer. A notary public may be an employee of the clerk of the circuit court but the authority of that person to act as a notary public derives from the governor and not from the clerk of the circuit court. When a clerk of a court of record appoints a deputy to have the same power as he in the taking of acknowledgments, oaths and affidavits, the deputy exercises that power as a deputy clerk deriving his authority from the clerk.

I conclude, therefore, that a clerk of the circuit court may permit (not authorize) a notary public who is an employee of his office, to perform the services of a notary public in the clerk's office, but as a notary public, an independent officer, and not by reason of any authority from the clerk.

AS TO QUESTION 2:

A notary public is an independent officer of the state, deriving his authority from the governor and by inference from the State Const. (§15, Art. XVI). A notary public cannot derive authority as such from the clerk of the circuit court. Therefore expenses of a notary public would not be proper expenses to be paid by a clerk of the circuit court. See AGO 058-215.

AS TO QUESTION 3:

Clerks of the circuit court receive their compensation from fees as set out in §28.24, F. S., and as otherwise provided by law. The fee for administering an oath as set forth in §28.24, F. S., is compensation for services by the clerk, or by a deputy clerk in his stead. A notary public performing his function as a notary public in the office of the clerk of the circuit court may not charge

the fee for administering an oath as set out in §28.24. Statutes fixing fees of the clerk of the circuit court are to be strictly construed (*State v. Fussell*, Fla. 1946, 24 So. 2d 804). Such notary public is entitled to fees for services under §117.05, F. S., and these are the fees of the notary public, not of the clerk of the circuit court. Therefore, if an employee of the clerk's office makes a notary public charge as prescribed in §117.05, F. S., that money belongs to him. If he also is a deputy clerk and takes an acknowledgment as such deputy, then he should charge the fee for oath prescribed in §28.24, F. S., and this money is properly the income of the clerk.

AS TO QUESTION 4:

I have stated above that fees of a notary public who also is an employee of a clerk of a court of record are personal to the notary public and are not income of the office of the clerk.

AS TO QUESTION 5:

The above answers are not affected by the fact that a notary public also is a deputy clerk. However, he must function either as a notary public, which is a separate public officer, or as a deputy clerk, when he is performing services and taking acknowledgments, etc. He cannot function simultaneously as both. Thus as a notary public he would use his notary seal and sign himself as a notary public. If he charges a fee for such services, the fee belongs to him. If he takes such acknowledgments, etc., as a deputy clerk, then he would use the seal of the office and sign as a deputy clerk and the fee for such services belongs to the clerk's office.

I trust the above answers your questions satisfactorily.

064-82—June 30, 1964

TAXATION

WHOLESALE WAREHOUSE MORTGAGE AGREEMENTS— DEFINITION—PRINCIPAL OBLIGATION—APPLICABILITY OF §201.21, F. S.—§§697.01 AND 697.02, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. What are those "agreements commonly known as wholesale warehouse mortgage agreements" mentioned and referred to in §201.21, F. S., relating to documentary stamp taxes?

2. Would the terms of the principal obligation, as principal obligations are defined in §201.21, F. S., be in any way determinative of whether the warehousing agreement was a wholesale warehousing mortgage falling within the exemption from excise taxes provided by said section?

Section 201.21, F. S., provides:

There shall be exempt from all excise taxes imposed by chapter 201, all promissory notes, non-negotiable notes and other written obligations to pay money bearing date subsequent to July 1, 1955, *hereinafter referred to as "principal obligations,"* when the maker thereof shall pledge or deposit with the payee or holder thereof pursuant to *any agreement commonly known as a wholesale warehouse mortgage agreement*, as collateral security for the payment thereof,

any collateral obligation or obligations, as hereinafter defined, provided all excise taxes imposed by this chapter upon or in respect to such collateral obligation or obligations shall have been paid. If the indebtedness evidenced by any such principal obligation shall be in excess of the indebtedness evidenced by such collateral obligation or obligations, the exemption provided by this section shall not apply to the amount of such excess indebtedness, and in such event the excise taxes imposed by this chapter shall apply and be paid only in respect to such excess of indebtedness of such principal obligation. The term "*collateral obligation*," as used in this section shall mean any note, bond or other written obligation to pay money secured by mortgage, deed of trust or other liens upon real or personal property. (Emphasis supplied.)

We have been advised that it is universally accepted in banking and other financial circles that a "wholesale warehouse mortgage agreement" comprehends the whole varied and broad range of working capital type loans which are secured by any document falling within the definition of "collateral obligation" as used in §201.21, F. S., above-quoted, many of these lending arrangements being of a revolving type. Quite often under these revolving arrangements the amount outstanding under the "principal obligation" varies upward and downward, and the "collateral obligation" revolves in and out during the life of the loan arrangement. Such arrangements often amount to a "secured line of credit." Under such arrangements businessmen who sell property to the general public on a deferred payment arrangement often borrow from banks and other financial institutions, warehousing such deferred payment paper as they receive in their business as security for the repayment of the moneys borrowed by them instead of selling such paper to the banks and financial institutions. In these transactions such deferred payment paper is often assigned or endorsed to the banks or financial institutions, to be held by such banks and financial institutions as security for the repayment of the moneys borrowed, and not as transfers of title to the said deferred payment paper. These transactions are in the nature of mortgages or liens and not as transfers of the legal title thereto. (§§697.01 and 697.02, F. S.).

A so-called "wholesale warehouse mortgage agreement" may be, and often is, a pledge of written obligation as security for future advances of money, or even as security for an open account, in which the obligation between the bank or other financial institution may change from day to day with the obligation under the "wholesale warehouse mortgage agreement" likewise changing from day to day. It may well be that the money to be borrowed under the said wholesale warehouse mortgage agreement will not be subject to exact determination as of the time of the entering into of such agreement. There might well be nothing due and owing at the time of the entering into of the said agreement, the obligation arising from the future advances of funds. There may also be a constant change in the written obligations that are pledged under the wholesale warehouse mortgage agreement, some of the obligations being paid and discharged and taken from under the said agreement while others are created and added to the said wholesale warehouse mortgage agreement. While the securities pledged under a wholesale warehouse mortgage agreement are pledged to

secure changing obligation, and the pledged securities may and often do change from time to time, the securities pledged to a bank or other financial institution to secure an ordinary loan or obligation seldom change during the life of the loan or obligation secured.

The term "wholesale" carries with it a meaning different from the term "retail," often used in the sense of sales in large quantities instead of by the piece or in small quantities; it carries with it a sense of something in gross and not in units. The term "warehouse" carries with it a deposit of something in a warehouse, a storage in a warehouse, for which the warehouseman issues his receipt therefor. The warehouseman holds the goods warehoused with him for a particular purpose, usually safekeeping. The phrase "wholesale warehouse mortgage agreement," as used in §201.21, F. S., seems to refer to the furnishing of security for a loan or obligation in the form of numerous items of security, such as promissory notes, retain title contracts, personal property mortgages, and other types of security, which are deposited with the lender, or with a trustee to be by him held as security, as security for obligations of the borrower to the lender. The term "wholesale" seems to contemplate numerous items of security, not merely one or two or three, etc., but a number of items, being furnished or *warehoused* with the lender as security for changing obligations, changing from day to day or time to time.

From the authorities above-mentioned and discussed, and the foregoing comments, we conclude that:

1. The "agreements commonly known as wholesale warehouse agreements," mentioned in §201.21, F. S., relate to those agreements by and between money lenders and borrowers whereby a line of credit is extended by the lender to the borrower which is secured by the deposit of securities which change from time to time by the maturity and payment of some and the addition of others, and the lending of additional sums from time to time, where the security furnished is of a changing nature and where the obligation secured is also of a changing nature. The pledging of specific securities to a bank or financial institution as security for the payment of a particular loan or obligation would not be a wholesale warehouse mortgage agreement within the purview of §201.21, F. S.; in such a case there would be no warehousing of securities within the purview of said §201.21, F. S.

2. Although the terms of the principal obligation, as defined in §201.21, F. S., might be sufficient to constitute a wholesale warehouse mortgage agreement within the purview of said section, it, on the other hand, might not be sufficient. Whether there has been established such an agreement must be determined from all the writings, including the obligations to pay money, making up the agreement by and between the lender and the borrower, read and construed in the light of the above and foregoing.

064-83—July 1, 1964

CRIMINAL PROCEDURE

AUTHORITY OF PUBLIC DEFENDER TO SUBPOENA WITNESSES—§§27.50-27.54, 27.57, 27.58, 28.24, 28.241, 142.01, 932.36, 932.37, F. S.; CH. 63-409, LAWS OF FLORIDA

To: *E. S. Blair, Clerk Circuit Court, Monticello*

QUESTIONS:

1. Does a public defender have authority to issue praecipe for witness subpoenas?

2. If the public defender issues praecipe for witness subpoenas, or if such witness subpoenas are issued on his behalf, from what fund should such witnesses be paid?

AS TO QUESTION 1:

The office of public defender was created by Ch. 63-409 and the provisions of that chapter have become §§27.50-27.54, 27.57 and 27.58, F. S.

The public defender within each circuit shall represent any person who has been determined to be insolvent as provided in Ch. 63-409 and who has been arrested for or charged with a non-capital felony, if such person requests representation by the public defender or if the court so orders it. (§27.51, F. S.)

The public defender shall be allowed process of the court to summon witnesses to testify before the court concerning the financial ability of any accused person to employ counsel for his own defense. (§27.52, F. S.)

However, there is no provision in Ch. 63-409 to authorize a public defender to issue praecipe for witness subpoenas to persons who will testify at either a preliminary hearing or in the trial of a cause involving such insolvent defendant.

Section 932.36, F. S., provides that a person charged with a criminal offense and brought before a justice of the peace or a county judge for examination or trial and who files an affidavit of insolvency, may require the issuance of subpoenas for witnesses not to exceed 2 in the proof of any one fact and the cost in such case shall be paid by the county. The *defendant* must make the necessary affidavit that certain witnesses are necessary to his defense.

The fact that a public defender may represent the indigent defendant in such preliminary hearing or trial before a justice of the peace or county judge in a noncapital case contemplates only that the public defender would suggest to the defendant the need to make an affidavit for procuring witnesses. The magistrate or trial judge in each instance can issue witness subpoenas for such defendant only on the affidavit of the defendant himself.

Likewise, where a person is brought to trial in any court of criminal jurisdiction other than that of a justice of the peace or county judge, if such defendant makes and files an affidavit that he is insolvent and unable to procure the attendance of witnesses and that certain witnesses named by him are required to produce certain testimony necessary in his defense, the judge of that court, if satisfied of the good faith and truth of such affidavit, shall order that subpoenas be issued and served to procure the attendance of such witnesses not to exceed 2, to prove any one fact, and

the cost in such case, when audited and approved, shall be paid by the county. (§932.37, F. S.)

When a defendant in a preliminary hearing or a trial for a criminal offense shall desire more than 3 witnesses, he shall make an additional affidavit that all witnesses desired by him in excess of 3 are relevant witnesses, and that he cannot go to trial without them. Also, his attorney shall certify that in his judgment such witnesses should be summoned in order to secure a fair trial of the defendant. (§932.37, F. S.) In such a situation, if the defendant is being tried for a noncapital offense and is represented by a public defender, it would be the responsibility of the public defender to certify to the court the need for witnesses in excess of 3, but the court would issue the witness subpoenas.

I conclude, therefore, that a public defender has authority to issue praecipe for witness subpoenas only to procure witnesses who will testify on the question of the financial ability of the defendant in a noncapital criminal case to employ counsel for his own defense.

AS TO QUESTION 2:

Each of the counties of this state is empowered to expend moneys in furtherance of Ch. 63-409, relating to the powers and duties of the public defender. Included in such powers is that of issuing praecipe for witness subpoenas to procure witnesses to testify to the financial ability of the defendant in a noncapital criminal case to employ counsel, and therefore the witness costs in such cases shall be paid by the county in which the defendant is examined or tried.

Costs for witnesses subpoenaed by the court for such defendant shall be paid from the fine and forfeiture fund of the county where the crime has been committed. (§142.01, F. S.)

I call attention to an apparent conflict between provisions of the public defender act and §142.01. Section 27.52, F. S., requires any costs paid by the county or state in behalf of an insolvent defendant represented by a public defender and later recovered by the state attorney in appropriate proceedings to be deposited in the general revenue fund of the county. In §142.01, F. S., it states that the fine and forfeiture fund shall include "all costs refunded to the county." Section 27.52, F. S., being the latest legislation on this subject, shall control.

The foregoing opinion relating to the authority of the public defender and to the payment of witness fees on behalf of insolvent defendants represented by him is subject to provisions of any local or population act affecting your county on this subject.

Fees allowed to the clerk of the circuit court for issuing, docketing and filing witness subpoenas and for paying such witnesses apply to those subpoenaed by the public defender as well as those subpoenaed on order of the court in behalf of an insolvent defendant, as provided in §§28.24 and 28.241, F. S.

064-84—July 6, 1964

REGULATION OF PROFESSIONS AND VOCATIONS

ARCHITECTS AND ENGINEERS—BUILDING PERMIT REQUIREMENTS—CHS. 467, 471, §§467.09, 467.17, 467.18, 471.05, 471.07, 471.08, 471.33, F. S.; CHS. 25999, 1949, 30958, 1955, 59-1542, LAWS OF FLORIDA

To: *Kenneth W. Cleary, Attorney, Manatee Board of County Commissioners, Bradenton*

QUESTIONS:

1. Is Manatee county under an obligation to insure that Florida Statutes regarding registration of architects and engineers are complied with prior to the issuance of a county building permit?

2. May Manatee county require conformance to the laws regulating architects and engineers as prerequisites to the issuance of a building permit?

AS TO QUESTION 1:

Manatee county is governed as to construction or use of buildings in unincorporated areas by Ch. 25999, 1949; Ch. 30958, 1955, and by Ch. 59-1542.

Formal permit was required as a prerequisite for anyone to construct, alter, repair, remove or demolish buildings or to commence any of the foregoing, such permit to come from an agent of the board of county commissioners of Manatee county (Ch. 25999). Application for such permit was made by the owner or lessee, or agent of either, or by the architect, engineer or builder employed to do the work. There is no requirement in this act that a registered architect or engineer be employed on any structure subject to such building permits. Nor is there any provision that Manatee county shall require anyone concerned with the design of structures subject to such building permits to comply with state laws on registration of either architects or engineers.

Much the same appears in Ch. 30958, which is supplemental to Ch. 25999, at least as to zoning. The governing body, or county commission, is authorized in Ch. 30958 by ordinance "to establish appropriate procedure and forms in connection with" building permits authorized therein, and to establish a scale of fees to be charged for such permits. There is no provision requiring the participation of registered architects or engineers as prerequisites to the issuance of any building permit.

A separate building department under the board of county commissioners was established by Ch. 59-1542, with a director to issue building permits, to approve or disapprove building plans and specifications, to inspect buildings under construction and to insure that building and construction shall be in conformity with any building, electrical, plumbing or sanitary codes adopted by the board of county commissioners of Manatee county, or by the state board of health or by virtue of laws of Florida.

Nowhere in this act does there appear specific authority for the Manatee county board of county commissioners or its agents to require the registration of either an architect or an engineer as a prerequisite to the issuance of a building permit for construction.

Chapter 467, F. S., establishes the Florida state board of archi-

ture, such board to issue a state license for the practice of architecture after the applicant has successfully passed an examination, and to have certain other duties and powers.

Section 467.09, F. S., states that no one need qualify as a registered architect to make plans and specifications for or to supervise the erection, enlargement or alteration of any building upon any farm, or any one or two-family residence building costing less than \$10,000, or certain other lesser exempt forms of construction. Registered engineers and their agents may perform architectural services which are incidental to their engineering, and registered architects may perform engineering services incidental to their architectural work. All other urban and suburban architectural services must be performed by registered architects.

Enforcement of these provisions, however, is directed against those who would falsely represent themselves to be registered architects, etc. (§467.17, F. S.). Such misrepresentation is a misdemeanor and is punishable as all other similar offenses. In addition, the Florida state board of architecture by §467.18, F. S., is authorized to apply for injunctive relief against alleged violations of the act requiring registered architects to prepare plans and specifications for certain buildings.

Professional engineers are regulated by the provisions of Ch. 471, F. S., and those entitled to a license as such must be examined and passed by the Florida state board of engineer examiners (§471.08, F. S.) with certain exceptions (§§471.05, 471.07, F. S.). It is made the duty of officers of the law to prosecute alleged violators of the provisions of this act (§471.33, F. S.).

I find nothing in either the local acts affecting Manatee county nor in the general laws governing architects and engineers which would make it the duty of the Manatee county board of commissioners to insure compliance with laws regulating registration of engineers and architects.

AS TO QUESTION 2:

The board of county commissioners of Manatee county is authorized by Ch. 59-1542 to adopt regulations, rules and restrictions to effect the primary purpose of promoting the health, safety, morals, growth and general welfare of the citizens and people of Manatee county, by, among other things, controlling the construction of buildings. Section 21.1 of this act authorizes the county commission by ordinance to require the obtaining of a permit for construction, alteration, etc., of any building in the unincorporated area of Manatee county. Such ordinance (§8.2) may "control, regulate, establish, define and restrict in the unincorporated areas of Manatee County" all types of construction.

The authority of boards of county commissioners is governed entirely by statutes which must be strictly construed as to the powers exercised by such boards. Although Ch. 59-1542 authorizes the board of county commissioners of Manatee county by ordinance to require the obtaining of a permit for construction, alteration, etc., of any building in the unincorporated area of Manatee county, there is no specific authority for the county commission to require that such permits be issued only to those who have complied with the laws regulating architects and engineers.

Question 2, therefore, is answered in the negative.

064-85—July 13, 1964

COUNTY CONSTITUTIONAL OFFICERS

APPOINTIVE COUNTY SUPERINTENDENT OF PUBLIC INSTRUCTION; REMOVAL FROM OFFICE, TERM OF OFFICE—§§2A, 2B, ART. XII, §6, ART. VIII, STATE CONST.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

QUESTIONS:

1. Is an appointive county superintendent still a constitutional officer?

a. If so, can the county board dismiss him from office or would the power of removal be reserved to the governor?

2. Is the term of an appointive county superintendent 4 years?

a. If the term is 4 years, may a county board appoint a superintendent for less than 4 years?

b. If the term of office is 4 years, and the county board appoints a superintendent and fixes the term for a lesser period, would the term automatically be for a period of 4 years due to the fact that an appointment was made?

In the case of *W. A. Hancock v. The Board of Pub. Inst. of Charlotte County* the supreme court of Florida (158 So.2d 519) held that:

Constitutional amendment providing for county referendum on question of making office of county superintendent of public instruction appointive does not repeal constitutional provision for a four-year term of office for all county superintendents or any other constitutional provision relating to office of county superintendent except provision that such office shall be elective. (F.S.A. Const. §6, Art. VIII; §2B(1), Art. XII. (Headnote 4).)

... This amendment provided only for a change in the method of selecting a Superintendent of Public Instruction in the several counties named therein in the event a majority of the qualified electors of any such county should vote affirmatively on the "proposition." Said amendment deals only with *the office* of County Superintendent of Public Instruction—not with the present or any future incumbent as such. (Emphasis supplied.)

Amended Article XII, as proposed and adopted, does not specifically or by inference repeal the provision of Article VIII, Section 6 of the Florida Constitution which provides for a four-year term of office for all county superintendents of public instruction. We find in Amended Article XII no repeal of any constitutional provision relating to *the office* of county superintendent except the proviso that such office shall be elective. (Emphasis supplied.)

In view of the above, your questions are answered as follows:

Question 1 is answered in the affirmative. As to question 1(a), the power of removal is still reserved to the governor.

Question 2 is answered in the affirmative. Question 2(a) is answered in the negative unless said appointment is to fill a vacancy for the remainder of the regular four-year term. Question 2(b) is answered in the affirmative.

064-86—July 13, 1964

COUNTY SCHOOL BOARDS

DISPOSAL OF SCHOOL PROPERTY—REAL ESTATE BROKER FEES; RAZING OF BUILDINGS—

§§235.04, 230.23(10) (i), F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

QUESTIONS:

1. Can the county school board, independent of and separate and apart from the appraised value, pay for professional services in regard to the sale of school property?

2. Can the county school board, independent of and separate and apart from the appraised value, pay for necessary costs in razing or removing present improvements together with relocating various and sundry utility easements, including but not limited to underground drainage culverts so as to make the property salable and usable?

Section 235.04, F. S., provides:

Disposal of school property.—The county board may dispose of any school land or property which is by a resolution of such county board determined to be unsuited for school purposes either because of location, condition, or other cause. The county board shall take diligent measures to dispose of school property only on the most advantageous terms by public or private sale. If, in the opinion of the county board, said school land or property to be disposed of is worth over five hundred dollars, then said county board shall have such property appraised by three qualified appraisers acting as a body and shall not accept a price less than the appraised value placed on such land or property by said appraisers; provided, that where trade-ins are involved in the replacement of worn-out equipment the dealers' bids, after at least three have been requested in accordance with law, would constitute a legal appraisal. The official minutes of the school board shall set forth the name of the purchaser, the sale price, and, if the same is over five hundred dollars, the appraised value, and the identity of the three appraisers in each such transaction. (Emphasis supplied.)

In view of the provision that the board "... shall not accept a price less than the appraised value placed on such land or property by said appraisers," it would appear dubious that the board could employ a real estate broker as contemplated in question 1.

Section 230.23(10) (i), F. S., provides, in part, that the board

may "contract for materials, supplies and *services* needed for the county school system. . . ." (Emphasis supplied.)

Such employment contracts, however, must necessarily contain the essential requirements of a contract; for example, a stipulated consideration, the services to be performed and completed during the term of the contract, etc.

Real estate brokers by the nature of their work are unable to guarantee a sale at the appraised value of the property to be sold during the term of the contract for their services.

Professional services as contemplated in the questions do not appear to fall within this category. For example, engineering, architectural or legal professional services contracted for by a school board can and should set forth specific duties to be performed during a specified term and for a specified consideration.

The services performed by real estate brokers do not appear to come within this limitation. The normal agreements between real estate brokers and their clients contemplate that the broker will undertake to sell property for a stipulated percentage of the sale price if and when a sale is consummated.

I suppose a school board might employ on a salary basis a competent individual for the purpose of selling any surplus or unneeded property owned by the board and his compensation would not be determined by the amount of successful sales which he was able to consummate. This kind of personal service agreement, however, would not appear to be in accord with the usual and approved practices and procedures of licensed real estate brokers who are supervised and regulated as to ethics and procedures by the state real estate commission.

Subject to the above remarks, question 1 is answered in the negative.

As to question 2, referring again to \$235.04, *supra*, the board is charged with the duty to ". . . take diligent measures to dispose of school property only on the most advantageous terms. . . ."

This being the case, I believe the board is authorized to exercise *reasonable discretion* in the sale of surplus school property in matters which relate to putting the property in the most acceptable condition to be disposed of as contemplated in your question.

If it is shown that the razing of existing condemned buildings on the property would reasonably be expected to enhance the sale value of the property at its appraised value, it is my opinion that the board would be authorized to spend school funds for said purpose. This reasoning would, of course, apply to the relocation of utility easements including drainage culverts.

Subject to the above comment, question 2 is answered in the affirmative.

064-87—July 13, 1964

SUFFRAGE

CONVICTION OF PETIT LARCENY—DISQUALIFICATION TO VOTE—§5, ART. VI, STATE CONST.; §97.041, F. S.

To: Ben Daniel, Jr., Assistant State Attorney, Ocala

QUESTION:

Is a person who has been convicted of petit larceny,

and whose civil rights have not been restored, entitled to vote in this state?

Section 5, Art. VI, State Const., provides that:

The Legislature shall have power to, and shall, enact the necessary laws to exclude . . . from the right of suffrage, all persons convicted of . . . larceny or of infamous (sic), crime, . . .

Pursuant to this constitutional mandate, the legislature has provided in §97.041, F. S., that:

. . . The following persons are not entitled to vote:

* * *

(5) Persons convicted of . . . larceny or infamous crimes in this or other states. . . .

In 1881, under similar constitutional and statutory provisions, the supreme court of Florida ruled in *State ex rel Jordan v. Buckman*, 18 Fla. 267, that a conviction of petit larceny disqualified a person from voting in this state. At that time, §4, Art. XIV, Constitution of 1868, provided that:

The Legislature shall have power and shall enact the necessary laws to exclude . . . from the right of suffrage, all persons convicted of . . . larceny, or of infamous crime,

. . .

and an 1868 statute provided that “. . . persons hereafter convicted of . . . larceny, or other infamous crime, shall not be entitled to vote.”

Since the governing constitutional and statutory provisions which existed at the time of the supreme court's said decision in 1881 were in substance and effect the same as those which exist today, said decision is equally applicable now and requires a negative answer to your question.

In conclusion, it is my opinion that a person who has been convicted of petit larceny, and whose civil rights have not been restored, is not entitled to vote in Florida.

This opinion is consonant with AGO 053-60, rendered by my immediate predecessor in office (Attorney General's Biennial Report for 1953-1954, p. 72).

064-88—July 14, 1964

INCOMPETENTS

EXPENSES OF ALLEGED INCOMPETENT DETAINED IN
MUNICIPAL HOSPITAL—§§394.21-394.23, 125.01(4), F. S.;
CHS. 4357, 1895, 20504, 1941 AND 23157, 1945,
LAWS OF FLORIDA

To: James C. Gwynn, County Judge, Tallahassee

QUESTION:

Where an alleged incompetent is detained in a municipal hospital such as Tallahassee memorial hospital, under order of the county judge, is the expense of such detention a county expense and should it be borne and provided for in the budget of the county?

I assume your question involves an adult and not a juvenile and this opinion is given on that assumption.

Your inquiry is founded upon your duties under §394.22(5)(b),

F. S., 1963, relating to the detention of an alleged incompetent, which subsection reads as follows:

The judge may, if in his opinion the public safety or the safety of the alleged incompetent requires it, direct that the sheriff forthwith confine said alleged incompetent in some specified place until the further proceedings herein provided for have been had, or until his further order; the judge may also order the detention of said person for such reasonable time as may be necessary for proper medical observation and examination, not to exceed fifteen days, unless extended for good cause; provided, that in all such cases, there shall first be filed with said judge an affidavit setting forth facts which make such detention necessary.

This subsection is a part of §2, Ch. 23157, 1945. This chapter in turn amended Ch. 20504, 1941, which became §§394.21, 394.22 and 394.23, in the 1941 version of Florida Statutes.

Section 394.22(5) (b), F. S., 1963, as a part of §2, Ch. 23157, 1945, originated with Ch. 4357, 1895, dealing with the functions of the county judge in the instance of those charged with mental incompetency and the proceedings thereof. In §5 of Ch. 4357 there is this proviso: "Provided all accounts accruing in pursuance of this act shall be approved and paid by order of the county commissioners out of the general revenue fund of the county where such insane person resides. . . ." At no place in the list of subsequent legislation is this provision repealed.

This and subsequent provisions for county payment of the costs of proceedings involving the examination of persons alleged to be mentally or physically incompetent also contain the power for the county judge or the examining committee "to ascertain whether the person being examined is indigent or possesses sufficient available means for his support" and even may extend to a determination of the possibilities of his acquiring property in the future, (§394.22(7) (a)), but I find no express provision for the county to recapture amounts paid for the hospital or other examination expense of a person under custody and examination, prior to commitment.

Section 394.23(4), 1963, F. S., repeats the wording of Ch. 4357, with minor exceptions, as follows:

(4) Subject to the exceptions set forth in succeeding subsections (5) and (6) hereof, all accounts accruing in pursuance of this chapter shall be approved and paid by order of the board of county commissioners of the county wherein the incapacitated person resides.

Subsections (5) and (6) refer to prisoners at the state prison farm in Union county, to state hospital inmates in Gadsden county and to those held in institutions in other states.

So from the beginning of Florida law dealing with the county judge's function in connection with mental incompetents, down to the present, the accounts or expenses accruing in pursuance of such law were to be paid by the county.

The county commissioners are authorized by §125.01, F. S., 1963, in subsection (4): "To have care and provide for the poor and indigent people of the county."

I find no specific statutory authority for the payment of private hospital bills for an alleged incompetent detained on order of a county judge, but the legislature at each revision of the laws dealing with this subject seemed to intend that accounts accruing

in pursuance of these acts are to be paid by the county commission.

You will note that provision for the recapture of public funds paid on account of committed incompetents from the private estates of such incompetents (§394.22(13)) does not include any provision for such recapture for individuals *alleged* to be incompetent but not so adjudged.

Originally these payments were for an alleged incompetent in the county where he resided, but I note that in §394.22(1) this wording appears: "Whenever any person within this state is believed to be incompetent by reason of mental illness . . . application by written petition, under oath, may be made to the county judge of the county wherein the alleged incompetent resides or *may be found*. . . ." (Emphasis supplied.)

I quote from an opinion by my predecessor in which I concur, and which dealt with an interpretation of §394.22(7)(b)(c), as to the payment of fees for an attorney and witnesses for an indigent incompetent:

It would appear that since incompetency proceedings may be instituted in the county wherein the alleged incompetent resides or may be found, the cost of such proceeding should be assumed by the county wherein the proceeding is actually held, regardless of the permanent nature of the residency of the incompetent in said county." (AGO 059-266, dated Dec. 17, 1959.)

I conclude therefore that expense of detaining an alleged incompetent in a municipal hospital under proper orders of the county judge for not to exceed 15 days is a county expense.

Accounts for incompetents are to be paid by the county where the incompetency proceedings are held. Such anticipated expenses should be borne and provided for in the budget of the county.

064-89—July 14, 1964

ADOPTION OF MINORS

RECORDING OF FINAL DECREES—CLERK'S RECORD—

CHS. 28, 72; §§28.29, 72.05, 72.27, F. S.; CHS. 21759, 1943, 23825, 1947, 29703, 1955, LAWS OF FLORIDA

To: John Nicholson, Clerk, Circuit Court, Ocala

QUESTION:

Is a clerk of the circuit court required to record the final decree in a proceeding for the adoption of a minor, or merely index such decree in the names of the petitioners seeking such adoption in view of an apparent conflict between §§28.29 and 72.27, F. S.?

Chapter 28, F. S., which relates to the powers and duties of the clerk of the circuit court, who our court has held is an officer of the court whose duties are *ministerial* and, as such, he does not exercise any discretion (*Pan American World Airways v. Gregory*, 96 So.2d 669), substantially provides in §28.29 thereof that every order of *dismissal*, *final judgment* and *final decree* shall be recorded; that all other orders, judgments and decrees shall be recorded only upon the order of the court. However, when orders, judgments or decrees are not recorded pursuant to the provisions of said section, that same shall be equally valid as if recorded. Said section was enacted as a part of Ch. 23825, 1947.

Chapter 72, F. S., relating to adoption, substantially provides in §72.27 that "the court files, records and papers in proceedings

for the adoption of minors are hereby declared to be confidential, and shall be *indexed* only in the *name* or *names* of the *petitioners* seeking such adoption and *neither* the *name* of the *minor* *before* or *after* the adoption shall be noted on any docket, index or other record outside of the court file in such proceedings. At any time during the progress of the cause the court may enter an order impounding all files, records and papers therein. In all adoption proceedings, upon entry of a final decree, the court files, records and papers shall be sealed and shall not be open to inspection except upon order of said court." (Emphasis supplied.)

In construing a statute, the court will consider its history, evil to be corrected, subject to be regulated, purpose to be accomplished and all other relevant and proper matters that may assist in ascertaining legislative intent, which is the polestar by which courts must be guided in construing a statute (*Ervin v. Peninsular Tel. Co.*, 53 So.2d 647; *Singleton v. Lawson* 46 So.2d 186).

Section 72.27, *supra*, was enacted as a part of Ch. 29703, 1955, which was 8 years after the enactment of §28.29, *supra*. Therefore, if any conflict exists between the 2 sections, the last expression of the legislature will prevail (*Johnson v. State*, 27 So.2d 276; cert. denied, 329 U.S. 799).

The history of §72.27, *supra*, reveals that prior to its amendment by Ch. 29703, 1955, it substantially provided that court files in proceedings for the adoption of minors are confidential and shall be *indexed*, where filed as required by law, in the name of the minor before and after adoption.

It may be specifically noted that the substantial changes made by the 1955 amendment to §72.27, *supra*, was to provide for the *indexing* of proceedings to be done in the *name* of the *petitioners* seeking such adoption rather than in the name of the adopted minor, which is a complete change in the manner of indexing or docketing of adoption cases. (Note also the specific requirement in §72.39, that the final decree in adult adoption proceedings shall be recorded in the office of the clerk of the circuit court.)

A further search of the history of the adoption laws reveals that §72.05, F. S., relating to hearing and judgment in adoption proceedings, which provided, "if the order be granted, the same shall be made a *matter of record* in said circuit court" (emphasis supplied) was repealed by Ch. 21759, 1943, which was 4 years prior to the original enactment of §72.27 in 1947 (amended in 1955). So far as our study reveals, the former §72.05, *supra*, is the only reference to the final decrees or orders in cases of adoption of minors being recorded as a matter of record. Since the repeal of said section, subsequent adoption laws have provided for *indexing* such records.

In summary of the foregoing, a close comparison of the present §§28.29 and 72.27, F. S., *supra*, fails to reveal a definite conflict, inasmuch as §28.29 provides for all final decrees to be recorded and §72.27 requires that such decrees in cases for the adoption of minors shall be *indexed*. Therefore, it is my opinion that if such a final decree is to be recorded as required under §28.29, *supra*, it shall be done as provided by §72.27, *supra*, which requires that "*neither* the *name* of the *minor*, *before* or *after* adoption shall be noted on any docket, index or other record outside of the court file, and only the *names* of the *petitioners* seeking such adoption shall appear on that part of the decree or instrument which is recorded." (Emphasis supplied.)

In other words, the name of the minor shall be obliterated from all public records in the clerk's office. Such a practical application of the law is absolutely necessary in order to preserve the confidential nature of the records, which the legislature has prescribed. If such a procedure proves to be impossible due to the form of the final decree, then same should not be recorded and may be indexed only as provided by law. However, inasmuch as the clerk's duties ministerial, and in the absence of any material discretion, it may be advisable for you to seek advice from the court in such matters, or an amendment to the law by the legislature.

Your question is answered accordingly.

064-90—July 14, 1964

TAXATION

CONSTRUCTION OF §§193.021, 193.11 AND 193.201, F. S.— ZONING AND ASSESSMENT OF LANDS FOR AGRICUL- TURAL PURPOSES—CHS. 63-245, 59-226, 63-250, LAWS OF FLORIDA

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Must real estate be zoned as being for agricultural purposes, by the board of county commissioners, under and pursuant to §193.201, F. S., before such real estate may be assessed by the county assessor of taxes under and pursuant to §193.11(3), F. S.?

2. Where the owner of lands used for agricultural purposes, within the purview of §193.11(3), F. S., returns his said lands as being lands within said subsection, must the question of zoning be submitted to any existing zoning board for its action before such lands may be assessed under §193.11(3), F. S.?

3. May a zoning board, by zoning agricultural lands within the purview of §193.11(3), F. S., pursuant to §193.201, F. S., defeat the application of said §193.11(3) by zoning the same as residential, business, etc., lands?

4. Is §193.11(3), F. S., mandatory on zoning boards, requiring that when any lands are assessed as agricultural lands under said subsection that such lands must be zoned as agricultural lands for all purposes?

5. Is §193.021, F. S., relating to the valuation of real and personal property in this state for the purposes of ad valorem taxation, applicable to assessments made under and pursuant to §193.11(3), F. S.?

Section 193.11(3), F. S., provides that "all lands being used for agricultural purposes shall be assessed as agricultural lands upon an acreage basis, regardless of the fact that any or all of said lands are embraced in a plat of a subdivision or other real estate development. Provided, agricultural purposes shall include only lands being used in bona fide farming, pasture, grove or forestry operations by the lessee or owner, or some person in their employ. Lands which have not been used for agricultural purposes prior to the effective date of this law shall be prima facie subject to assessment on the same basis as assessed for the previous year, and any demand for a reassessment of such lands for agricultural purposes shall be subject to the severest scrutiny of the county

tax assessor to the end that the lands shall be classified properly. Provided, this subsection shall not be construed, interpreted, or applied so as to permit lands being used for agricultural purposes to be assessed other than as agricultural lands and upon an acreage basis."

Said §193.11(3), F. S., was derived from §1, Ch. 63-245, which became a law at midnight, May 30, 1963, filed in the office of the secretary of state on May 31, 1963, and became effective upon its becoming a law.

Under §193.201, F. S., "the board of county commissioners of any county in the state is authorized and empowered in its discretion to zone areas in the county exclusively used for agricultural purposes as agricultural lands, provided said lands have been used exclusively for agricultural purposes for five years prior to such zoning." The procedure for such zoning by the board of county commissioners is set out in said section.

Said §193.201, F. S., was derived from §1, Ch. 59-226, which appears to have become a law at midnight June 3, 1959, was filed in the office of the secretary of state on June 4, 1959, and became effective on July 1, 1959. The Florida Statutes, 1959, including the general acts of 1959 compiled therein by the statutory revision department was codified by Ch. 61-1, and were recodified, together with the general acts of 1961 compiled therein by the statutory revision department by Ch. 63-2, which act became effective April 10, 1963. If §193.11(3) and §193.201, F. S., in any way conflict with each other, said §193.11(3), F. S., would be the latter in point of time and would control over said §193.201, F. S., to the extent of the conflict, if any. (*Hillsborough County Commissioners v. Jackson*, 58 Fla. 210, 50 So. 423, text 424; *Lykes Bros., Inc., v. Bigby*, 155 Fla. 580, 21 So.2d 37, text 39; *State v. Webb*, Fla., 49 So.2d 93, text 93 and 94.)

It is provided in and by said §193.11(3), F. S., as amended by Ch. 63-245, above-quoted, that "all lands being used for agricultural purposes shall be assessed as agricultural lands upon an acreage basis, regardless of the fact that any or all of said lands in a plat of a subdivision or other real estate development. . . ." we note the following proviso also appearing in said subsection that "this subsection shall not be construed, interpreted or applied so as to permit lands being used for agricultural purposes to be assessed other than as agricultural lands and upon an acreage basis." Other applicable provisions in said §193.11(3), F. S., should be carefully followed by the assessing authorities.

When §193.11(3), F. S., is read along with and in connection with §193.201, F. S., and such statutes are construed together, remember that said §193.11(3) is the last and controlling law. If there be conflicting provisions in said statutes, the fact that said §193.11(3) requires the assessment of lands being used for agricultural purposes, within the meaning and purview of said subsection, be so assessed "regardless of the fact that any or all of said lands are embraced in a plat of a subdivision or other real estate development," and further requires that the said subsection "shall not be construed, interpreted or applied so as to permit lands being used for agricultural purposes to be assessed other than as agricultural lands on an acreage basis," we reach the conclusion that zoning by the board of county commissioners under or pursuant to §193.201, F. S., is not a condition precedent to assessment under and pursuant to said §193.11(3), F. S.

From the above and foregoing, questions 1, 2, 3 and 4 are answered in the negative. The fact that the first 4 questions are answered in the negative does not in any way prevent zoning under applicable zoning laws and statutes, as to all purposes other than ad valorem taxation of lands used for agricultural purposes. The zoning of such lands for any purpose other than lands used for agricultural purposes within the purview of said §193.11(3) F. S., is not prevented by said subsection. Only when used for agricultural purposes within the purview of subsection (3), *supra*, are lands taken out of the purview of said §193.201, F. S., and required to be assessed for ad valorem taxes as such.

Section 193.021, F. S., was derived from §1, Ch. 63-250, which act was approved by the governor on May 31, 1963, was filed in the office of the secretary of state on said day, and became effective on Jan. 1, 1964. This section is, therefore, subsequent in point of time to §193.201, F. S., and in case of conflict between the 2 statutes is controlling. Section 193.11(3), as above discussed, became a law and took effect at midnight May 30, 1963, while §193.021 became a law and took effect sometime on May 31, 1963, after the taking effect of §193.11(3) so that said §193.021 controls over §193.11(3), F. S., in case of conflict between the two statutory provisions which may not be reconciled by construction.

Question 5 is answered in the affirmative; provided, however, that the 7 elements of valuation must be limited to the lands as agricultural lands and not as to lands generally.

064-91—July 14, 1964

MOTOR VEHICLES

LICENSE PLATES—BAD CHECKS, SURRENDER OF PLATE— §§832.05(3), 78.01, F. S.

To: Arch Livingston, Motor Vehicle Commissioner, Tallahassee
QUESTION:

Where a county tax collector issues a motor vehicle license plate and accepts the personal check of the applicant therefor and upon presentation for payment the check is not honored by the bank, may the tax collector make demand upon the applicant for surrender of the said license plate?

At the outset, the various tax collectors should be advised that they should accept personal checks only at their peril. There is nothing in the statutes which requires or authorizes them to accept personal checks. Therefore, if they do so, and the check is ultimately not paid, then the tax collector would be personally liable for the amount of the check.

Where the check is accepted and not paid, it would be my view that either the tax collector or the commissioner could demand surrender of the tag. You will note that §832.05(3), F. S., makes it unlawful to obtain goods or services on the basis of a check where the maker thereof has not sufficient funds on deposit to pay the same. Section 78.01, F. S., authorizes the replevin of goods and chattels wrongfully detained by any other person or officer.

064-92—July 14, 1964

**REGULATION OF TRADE AND COMMERCE
LICENSING OF SECONDHAND MOTOR VEHICLE
DEALERS—§320.27, F. S.**

To: Arch Livingston, Motor Vehicle Commissioner, Tallahassee
QUESTION:

Where a secondhand motor vehicle dealer has been issued a license by the motor vehicle commissioner under §320.27, F. S., and removes his motor vehicle business from the location for which said license was issued during the current period of the license and commences his secondhand motor vehicle business at a different location, should the original license issued such dealer be canceled and a new license be issued by the motor vehicle commissioner for the new location of the dealer?

Section 320.27 (3), F. S., provides as follows:

A license certificate shall be issued by the motor vehicle commissioner in accordance with such application when the same shall be regular in form and in compliance with the provisions of this section, and such license, when so issued, shall entitle the licensee to carry on and conduct the business of buying and selling and dealing in used motor vehicles for a period of one year from the first day of January of the current year *only at the location set forth in said license.* (Emphasis supplied.)

Section 320.27 (4), F. S., provides as follows:

Any person conducting the business of buying, selling or dealing in used motor vehicles and having received a license therefor, *shall obtain a supplemental license for each additional place or places of business not contiguous to the premises for which original license is issued*, on a form to be furnished by the commissioner, and upon payment of a fee of five dollars for each such additional location. Only one licensed dealer shall operate at the same place of business. (Emphasis supplied.)

In view of the above and in the absence of any provisions in the statutes for the transfer of secondhand dealers licenses, I am of the opinion that where a secondhand motor vehicle dealer has been issued a license by the motor vehicle commissioner under §320.27, F. S., and subsequently removes that business from the location for which the original license was issued, that said dealer would be required to purchase a new license for the new location.

064-93—July 16, 1964

TAXATION

COMMISSIONS PAYABLE FOR ASSESSING AND COLLECTING DISTRICT TAXES—CHS. 378, 193, §§378.29, 193.65, F. S.; CHS. 25209, 25270, 1949; 61-669, 63-707, LAWS OF FLORIDA

To: William C. White, Attorney, Central and Southern Florida Flood Control District, West Palm Beach

QUESTION:

What is the measure of compensation to be paid county assessors and collectors of taxes for assessing and collecting central and southern Florida flood control district taxes in the several counties of the said district?

Chapter 378, F. S., controls generally the administration and operation of the central and southern Florida flood control district, created and established by Ch. 25270, 1949. Chapter 378, F. S., was derived from Ch. 25209, 1949. Said Ch. 25209 became a law on June 2, 1949, and became effective at the same time, and Ch. 25270, on June 10, 1949. In case of irreconcilable conflicts between Ch. 378, F. S., barring subsequent amendments thereof, and Ch. 25270, 1949, said Ch. 25270, being the later law in point of time, will control. Under §378.29, F. S., the county taxing officials who levy and collect flood control taxes "receive compensation therefor at such rates or charges as are provided by law with respect to similar services or charges in other cases." It is provided in §3 of said Ch. 25270 that such taxing officials "shall be entitled to compensation for services performed in connection with said tax (flood control taxes) at the same rate as applies to county taxes." The above-mentioned provisions in §378.29, F. S., and §3, Ch. 25270, are substantially identical provisions and provide the same rate of compensation.

Section 193.65, F. S., provides generally the compensation payable to county taxing officials for the assessment and collection of county and district ad valorem taxes, as well as license and other taxes collected by the county tax collector. Under this section the commissions for assessing and for collecting county general taxes is 10% on the first \$5,000 in amount of taxes levied and taxes collected; 5% on the next \$5,000 in amount of taxes levied and taxes collected; 3% on the balance of taxes levied and taxes collected on an assessed valuation up to \$50,000,000; and 2% on the balance. Said Section 193.65, F. S., provides commissions for assessing and collecting *taxing district taxes* of 3% of the amount of such district taxes levied and district taxes collected on an assessed valuation of \$50,000,000, and 2% on the balance. Said §193.65 appears to have been derived from Chs. 21918 and 20936, 1943 and 1941, and prior laws so that above-mentioned Ch. 25270, 1949, appears to be the latter law and will control in case of a conflict. As between §193.65, F. S., §378.29(4), F. S., and Ch. 25270, 1949, it appears that said Ch. 25270 is the subsequent and controlling law unless superseded by some subsequent law.

Several of the counties within the central and southern Florida flood control district have local laws or population acts fixing commissions for county assessors of taxes and tax collectors for assessing and collecting county and district taxes. *Chapter 61-669*, provides that in *Osceola County*, the commissions of the tax assessor and tax collector for collecting county general taxes shall receive a fee of 10% on the first \$5,000 in amount of taxes levied and collected, 5% on the next \$5,000 levied and collected, 3% on the balance of taxes levied and collected, up to the valuation of \$100,000,000 and 2% on the balance. On district taxes the fee is 3% on the amount levied and collected on the valuation up to \$100,000,000 and 2% on the balance. Chapter 63-707, provides that in *Charlotte county* the commissions of the tax assessor and the tax collector shall be substantially the same as are provided in said Ch. 61-669 *supra*.

When Chs. 61-669 and 63-707, which purport to fix the fees of certain county officers, are considered in the light of the opinions of the supreme court of Florida in *State v. Shepard*, 84 Fla. 206, 93 So. 667, text 671 and 672; *State v. Watkins*, 88 Fla. 392, 102 So. 347, text 347 and 348; *State v. O'Neal*, 99 Fla. 1053, 100

Fla. 1277, 128 So. 489, text 490, 131 So. 165, text 167; *Stripling v. Thomas*, 101 Fla. 1015, 132 So. 824, text 824 and 825; *Barrow v. Smith*, 119 Fla. 468, 158 So. 818, text 819; *Latham v. Hawkins*, 121 Fla. 324, 163 So. 709, text 710; *State v. Neville*, 123 Fla. 745, 167 So. 650, text 650 and 651; *Manatee County v. Davidson*, 132 Fla. 295, 181 So. 889, text 890 and 891; *State v. Foley*, 132 Fla. 595, 182 So. 195, text 196 and 197; *State v. Gray*, 133 Fla. 23, 182 So. 620; *State v. Gustafson*, 127 Fla. 741, 174 So. 12, text 13 and 14; and *State v. Bell*, Fla., 91 So. 2d. 193, text 194-196, we do not think that said Chs. 61-669 and 63-707, and like and similar laws should be construed as replacing Chapter 25270, 1949, or §378.29(4), F. S., as implemented by §193.65, F. S.

The measure of compensation to be paid county assessors of taxes and county tax collectors for assessing and collecting central and southern Florida flood control district taxes is that provided by §193.65, F. S., as referred to in §378.29(4), F. S., and §3, Ch. 25270, 1949, that is, as is provided for the assessment and collection of county taxes under said §193.65, F. S.

064-94—July 17, 1964

COUNTY OFFICERS AND EMPLOYEES

COMPENSATION OF COUNTY JUDGE AS JUDGE OF THE COUNTY COURT—CHS. 34, 39, 145, §§34.20, 34.21, 39.18, 145.021, 145.061, 145.14, F. S.; CHS. 61-1154, 61-1338, 63-572, LAWS OF FLORIDA

To: *George E. Adams, Judge, Orange County Court, Orlando*

QUESTION:

Is the salary of the judge of the county court, as provided by §34.20 or §34.21, F. S., where applicable, personal compensation of the county judge or included in the salary of the county judge provided by Ch. 145, Florida Statutes?

You will recall that the expressions of my predecessor in office on this subject, as appear in the Nov. 27, 1963, letter addressed to Hon. H. D. Garner, chairman of the board of county commissioners of DeSoto county, distinguished the order of Hon. Robert E. Willis, circuit judge, 12th judicial circuit, in and for Sarasota county, in the case of *Graham v. Sarasota County*, from the laws applicable to the county judge of DeSoto county and suggested that the entire matter be presented to a court of competent jurisdiction. Thus, this question, which has for some time been a matter of concern to most county judges and the state auditing department, could be resolved with finality for state-wide application. As of this writing, we are unfamiliar with any such litigation.

Apparently, the individual county judges as well as the state auditing department, when reviewing the financial affairs of the respective county judges' offices, have, over the years, construed the salary of the judge of the county court, as provided by §34.20 or §34.21, F. S., as income of the county judge's office. It is my understanding that the judges themselves report such salary as a part of the gross income of the county judge's office. Such reporting was in keeping with the interpretation of these sections by the state auditing department.

Chapter 34, F. S., unlike Ch. 39 insofar as it relates to the compensation of the county judge as juvenile judge, fails to specifically provide that the salary of the county judge as judge of the county court is to be in addition to that salary which said judge is to receive as county judge. (See §39.18(5), F. S. and AGO 051-350.) In addition, noteworthy is the provision of §34.21, F. S., to the effect that the salary of the county judge as judge of the county court pursuant to that section "shall not exclude or affect any salary, fees, or other compensation which the county judge, as such, may receive, or be entitled to."

Section 145.061, F. S., provides a schedule of salaries or, in the case of a fee officer, a schedule of maximum compensation which a county judge may receive. Significantly, neither §145.021 nor §145.14, F. S., expressly requires that the salary of the county judge as judge of the county court shall be included in his salary or maximum compensation as authorized by said §145.061.

In reconsidering the former expressions of this office, pursuant to your request, in light of the Graham decision, the only judicial pronouncement on the question before us, we are of the opinion that the salary as authorized a county judge pursuant to §§34.20 or 34.21, F. S., as applicable, in the absence of a special law or general law of local application to the contrary, is income personal to the county judge not to be included within the maximum salary or compensation as provided by §145.061, F. S. We arrive at this conclusion because of the pronouncement of the Graham decision, *supra*, the language of §34.21, F. S., and applicable sections of Ch. 145, F. S.

Because of the latent ambiguities which exist in the application of §§34.20 and 34.21, F. S., in those counties where the respective sections are applicable, we urge that this matter be presented to the legislature for clarifying legislation operative on a retroactive basis. Particularly is this so because of the serious question raised upon consideration of Chs. 61-1154 and 61-1338, Laws of Florida, which purportedly repealed §34.21, *supra*, although said section has since been reenacted by Ch. 63-572.

Your question is answered accordingly.

064-95—July 20, 1964

REGULATION OF VOCATIONS AND PROFESSIONS

BARBER SHOP REGISTRATION CERTIFICATES—§§476.221-476.223, F. S.

To: *James E. Burnette, Director, Florida Barbers' Sanitary Commission, Tallahassee*

QUESTIONS:

1. Do §§476.221-476.223, F. S., contemplate the purchase of another shop registration certificate if the name of the shop and ownership are changed?

2. According to your interpretation of the law, is a transfer of ownership provided for in §476.221, F. S.?

Sections 476.221-476.223, F. S., require barber shops to be registered with the Florida barbers' sanitary commission. Section 476.221, F. S., in particular, provides in part as follows:

476.221 Barber shop registration; requirements; fee.—

Every person, whether as owner, manager or agent who

opens or establishes a barber shop, place or establishment in this state shall, prior to opening or establishing of such shop, place or establishment, file with the Florida barbers' sanitary commission the *name and address of the owner of such shop* and the city or town and the street and number where the same is located, together with a fee of five dollars. . . . (Emphasis supplied.)

Section 476.222(1), F. S., which prescribes a penalty for failure to comply provides as follows:

476.222 Barber shop registration; penalties.—

(1) The commission may suspend or revoke any certificate of registration to practice barbering of any person either as owner or operator, manager or agent, who shall open, establish, *conduct or maintain a shop*, place or establishment in this state for the conduct of the occupation of barbering without having first received from the commission a certificate of registration *for such barber shop* or establishment. (Emphasis supplied.)

The foregoing provisions apparently contemplate the issuance of the certificate to the currently named owner as well as the currently named shop in question. It would seem that a new barber shop registration would have to be secured if there has been a change in either the ownership or the name of the shop. While provision is made for the transfer of the certificate of registration in the event there has been a change in location of a registered shop, the statutes are silent with respect to the *transfer* of a certificate of registration where there has been a change in the name and ownership of such shop.

Question 1 is answered in the affirmative and question 2 in the negative.

064-96—July 20, 1964

COUNTY ORGANIZATION

COUNTY FUNDS FOR TAXING DISTRICT HOSPITAL—CHS. 59-1385, 61-2275, LAWS OF FLORIDA; §§125.01(4), 401.06, CHS. 155, 401, F. S.; §3, ART. XIII, STATE CONST.

To: Douglas Baker, Clerk, Circuit Court, Vero Beach

QUESTIONS:

1. May Indian River county legally budget sufficient money to pay to the Indian River county hospital district an annual sum to meet estimated losses to the hospital from indigent and charity cases, even though the hospital district is authorized and will levy its legal maximum of five mills?

2. Would money so budgeted serve a county purpose in the case of patients who are not indigent but require hospitalization?

The Indian River county hospital district was created by Ch. 59-1385, which was amended by Ch. 61-2275. It is a separate taxing district, allowed to levy up to 5 mills per year. Currently, you advise that the Indian River memorial hospital, which is administered by trustees of the hospital district, is attempting to expand under the Hill-Burton act, which requires matching funds.

I gather from your letter that the hospital district has requested the board of county commissioners to budget from its general fund \$67,615 for the coming year to be paid to the hospital itself to meet anticipated losses from indigents and from non-certified charity cases requiring hospitalization. The net result of such payment would seem to be freeing of a similar amount for the hospital district to use in matching Hill-Burton funds instead of using it for the operating expenses of the hospital up to that amount.

Operation of this hospital by the district is described and declared to be a public purpose in §2, Ch. 61-2275, and for the welfare of the people of the hospital district. The trustees are authorized by §20 of this act to accept money from the welfare funds of Indian River county.

Indian River memorial hospital is not a county hospital under Ch. 155, F. S., although it is a public hospital. It may or may not serve all the residents of Indian River county as the described area of the hospital district does not seem to include the entire county. This hospital exists to serve the people of the described district, in which it is authorized to levy taxes for its support.

Counties in Florida "shall provide in the manner prescribed by law, for those of the inhabitants who by reason of age, infirmity or misfortune may have claims upon the aid and sympathy of society." (See §3, Art. XIII, State Const.) Boards of county commissioners are charged with the care and providing "for the poor and indigent people of the county." (See §125.01(4), F. S.) Boards of county commissioners have only such powers as are prescribed by the State Const. and statutes (Crandon v. Hazlett, 157 Fla. 574, 26 So.2d 638) and have no general powers.

In the absence of a statute to the contrary, a county is not liable for medical service or hospital care voluntarily furnished for the relief of a pauper, without a proper contract with or request from those officers charged with authority over such pauper cases (70 C.J.S. 159, §74).

County funds are administered by the board of county commissioners in the nature of a trust, as was observed in AGO 054-151, p. 174 of the 1953-54 biennial report of the attorney general, and I concur in the statement that there is doubt as to the authority of the board to pay an account where there is no liability on the part of the county to pay or to pay a moral claim where there is no legal claim.

Under provisions of §401.06, F. S., a licensed physician first determines whether a person needing hospital service as authorized by Ch. 401, F. S., is indigent and cannot pay for basic services provided therein. The county health department also may investigate such indigency except that where a person is receiving welfare aid, no further proof of indigency is required.

As I understand your inquiry, the board of county commissioners is being requested by the hospital district to assume in one lump sum payment the estimated county cost for participating in the indigency program under Ch. 401, F. S., as well as to provide for a considerable number of noncertified charity cases which do not qualify for Ch. 401, F. S., aid and for whose condition of indigency I find no special provision for determination.

The latter determination of indigency becomes the responsibility of the board of county commissioners as I find no special act authorizing a county welfare board. The commission may dele-

gate the responsibility for determining each case of indigency, but such cases would necessarily have to be dealt with on an individual basis, and as they develop. The county is not authorized to anticipate indigency even if it were possible.

In the instance of Indian River county, I believe that while the county has a legal right to pay for the hospital and medical care of the indigent of the county as identified, there is no clear-cut legal authority for the county commission to budget for and pay over to a separate taxing district a sum of money for the anticipated hospital care of persons over whose determination of indigency the county commission has no control.

I must therefore answer question 1 in the negative.

Question 1 being answered in the negative, renders question 2 moot; and such requires no answer.

064-97—July 22, 1964

MILK COMMISSION

USE OF LICENSE TAXES AND OTHER FEES COLLECTED
PURSUANT TO CH. 501, F. S.—§§501.09, 501.04, F. S.; §282.01(11),
ITEMS 347, 348 AND 349 1961-1963 BIENNIAL APPROPRI-
ATIONS ACT; §§2, 3 AND 4, ART. IX, STATE CONST.

To: Ernest Ellison, State Auditor, Tallahassee

QUESTION:

For what purpose or purposes may the license taxes, fees and other impositions provided for in §501.09, F. S., be used or expended?

We are primarily concerned with the authority and power of the Florida milk commission, existing under and pursuant to Ch. 501, to use and expend its funds, derived from taxes, fees and other impositions imposed and collected under and pursuant to §501.09, F. S., for purposes other than the administration and enforcement of Ch. 501, F. S. Of particular interest is the power and authority of the said commission to have and maintain milk stations in the capitol building and elsewhere from which fresh milk was served to members of the legislature and others during sessions of the legislature free of charge and at commission expense. We gather from the request for opinion and file before us that the milk in question was purchased with commission funds and that commission funds were expended in maintaining cooling equipment and serving the said milk as aforesaid.

The powers and authority of the milk commission are set out in §501.04, F. S.; however, we find no express provision in said §501.04, or otherwise in Ch. 501, F. S., expressly authorizing or permitting the said commission to purchase fresh milk, maintain cooling equipment therefor, and serve the same to members of the legislature, or to any other person or persons at commission expense during sessions of the Florida legislature or otherwise.

Section 501.09, F. S., imposes certain license taxes on persons, firms and corporations dealing in milk and milk products, usually ranging in amount from \$1 to \$5 per annum, together with a tax "in an amount equal to fifteen one-hundredths of one cent upon each gallon of milk distributed by each distributor during each calendar month." It is further provided in and by said §501.09, F. S., that all proceeds derived from said license

taxes, fees and other impositions "shall be promptly deposited in the state treasury in a separate trust fund to the credit of the commission. Such moneys are hereby appropriated *for the administration of this chapter* unless the legislature provide otherwise in the biennial general appropriations act." (Emphasis supplied.) The expenditures here in question were made during the 1962-1963 fiscal year, and before July 1, 1963, the effective date of the 1963-1965 biennial appropriation so that the 1961-1963 biennial appropriations act was applicable.

Items 347, 348 and 349, §282.01(11), F. S., 1961, appropriated from the milk commission trust fund above-mentioned for the fiscal year of 1962-1963 the sum of \$90,727 for salaries, \$110,340 for expenses, and \$2,600 for operating capital outlay. Our examination of the milk commission's budget request for the 1961-1963 biennium, the report of the state budget commission to the 1961 legislature, and the milk commission's budget for said 1961-1963, as the same appear in the office of the state budget director, fails to reveal any specific appropriation for the furnishing of fresh milk to members of the legislature or otherwise. There is nothing before us clearly indicating that the expenditures in question were "for the administration of" said Ch. 501, F. S.

A tax has been defined as a burden or charge imposed by the legislative power on persons or property to raise money for public purposes (30 Fla. Jur. 440-442, §3; 84 C.J.S. 30, §1). Although levied for purposes of regulation by the milk commission, the tax in question is nonetheless imposed for a public purpose, that is, the regulation of the milk business in Florida for health and other public purposes. The taxes in question were imposed to raise revenue to defray state expenses (§2, Art. IX, State Const.) and were imposed pursuant to law (§3, Art. IX, State Const.) and become state funds in the state treasury, subject to use only "in pursuance of appropriations made by law," (§4, Art. IX, State Const.) to be withdrawn only to an appropriation made by law.

From the above and foregoing it appears that funds derived from taxes imposed under and pursuant to §501.09, F. S., have been appropriated only *for use in the administration* of Ch. 501, F. S., and we find nothing in said Ch. 501, F. S., permitting the use of such funds for any other purpose. Such funds may be used only in the administration and enforcement of said Ch. 501, F. S., unless and until it be otherwise provided by law. The purchase and distribution of fresh milk for the use of members of the legislature and others, without charge, with funds derived from the taxes imposed by §501.09, F. S., is not the expenditure of such funds for "use in the administration" of Ch. 501, F. S.

064-98—July 22, 1964

PUBLIC CONSTRUCTION

APPLICATION OF MECHANIC'S LIEN LAW, CH. 84, F. S.— CH. 26106, LAWS OF FLORIDA

To: M. E. McKay, Attorney, Northwestern Palm Beach County
Public Hospital Board, Belle Glade

QUESTION:

Must the Northwestern Palm Beach county public hospital board comply with the mechanic's lien law,

Ch. 84, F. S., in constructing a new hospital structure on property owned by the board?

The board was created by Ch. 26106, 1949 and in §18 thereof it states:

The purposes for which any hospital created under the provisions of this Act shall be used are hereby declared to be for public purposes.

The supreme court of Florida, in *City of St. Augustine v. Brooks, Fla.*, 55 So.2d 96, has this to say about the effect of a mechanic's lien on public property:

... this court has held that a mechanic's lien will not attach to property held and used for a public purpose.

The general rule is that in the absence of a statute expressly providing for it, a mechanic's lien will not attach to and cannot be enforced against property held for public school purposes, the court observed, applying this rule to property held by the city of St. Augustine and used for public purposes.

It is my opinion, therefore, that the board is not required to comply with any provisions of Ch. 84, F. S., known as the Mechanic's lien law.

I call your attention to §255.05, F. S., which requires the person contracting with your board for the construction to execute a penal bond, with the additional obligation that he shall promptly make payments to all persons supplying him labor, material and supplies under the contract. Such bond and contract shall give a right of action to the person supplying such labor, material or supplies and suit may be brought in the name of the political subdivision involved for the use or benefit of the materialmen. I mention this as you will be thus indirectly involved.

064-99—July 22, 1964

PUBLIC OFFICERS**COMPENSATION OF APPOINTED OFFICERS NOT COMMISSIONED—§§113.05, 113.07(1), (3), F. S.**

To: *Thomas D. Bailey, Superintendent of Public Instruction, Tallahassee*

STATEMENT OF FACT:

A member of the county board of public instruction submitted his resignation effective as of Feb. 1, 1964. The governor then appointed his successor making the appointment effective Feb. 1, 1964. Because of an oversight in the insurance office, the appointee's bond was not executed until Apr. 1, 1964, although said bond when issued was dated Feb. 1, 1964. The bond was filed with the secretary of state in Apr., 1964, and the appointee's commission when issued was dated May 1, 1964.

QUESTION:

May this board member receive compensation for the months of Feb., Mar. and Apr., during which time he was serving on the county board without a commission?

I believe your question is answered by §113.05, F. S., which provides:

No commission to issue until bond filed, etc.—No commission shall be issued by the governor of this state

to any person who is by law required to give bond before he shall enter upon the duties of his office until after such bond shall have been duly executed, approved and filed in the office where it is required by law to be deposited, and official notice thereof given to the governor. and by §113.07(1) and (3), F. S., which provides:

(1) In all cases where public officials, not honorary, either state, county or district, are now, or shall hereafter be required to post fidelity or performance bonds, all such bonds shall be written by surety companies authorized by law to do business in the state.

(3) No such official shall be qualified to hold office or perform the duties thereof until such surety bond has been filed.

In view of the above, your question is answered in the negative.

064-100—July 24, 1964

COUNTY SCHOOL SYSTEM

COUNTY SUPERINTENDENT'S AUTHORITY WITH REFERENCE TO RECOMMENDATION OF PERSONNEL—

§§230.23(5)(a), (d), 230.30, 230.33(7)(a),
230.43(2), F. S.

To: Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee

QUESTIONS:

1. Does a county superintendent have authority to recommend himself to fill a position in the county school system?

2. Does a county superintendent have authority to recommend a person to fill a position in the county school system when such a position is not vacant?

3. Does the county board of trustees have authority to recommend to the county board, prior to beginning of the regular school term, any person for a position in the county school position (sic) when no vacancy will exist for such position prior to Jan. 7, 1965?

AS TO QUESTION 1:

Section 230.33, F. S., *duties and responsibilities of county superintendent*, under subsection (7), *personnel*, reads as follows:

(a) Positions and qualifications.—Recommend to the county board duties and responsibilities which need to be performed and positions which need to be filled to make possible the development of an adequate school program in the county and recommend minimum qualifications of personnel for these various positions.

This statute gives the county superintendent the authority to make recommendations as to personnel in the county school system. Section 230.23, F. S., *powers and duties of county board*, under subsection (5)(a), states as follows:

Positions and qualifications.—Act upon recommendations submitted by the county superintendent for positions to be filled and for minimum qualifications for personnel for the various positions. (Emphasis supplied.)

These sections do not preclude the county superintendent from

recommending himself for such a position; however, §230.30, F. S., requires that the county superintendent devote his full time to the position of superintendent. Therefore, it must be concluded that the county superintendent could not hold another position in the county school system so long as he was employed as a county superintendent. Aside from the limitations set out in §230.30, F. S., it is the opinion of this office that question 1 be answered in the affirmative.

AS TO QUESTION 2:

Section 230.23(5) (d), F. S., states as follows:

Appointment of instructional staff and other employees.—Act not later than six weeks before the close of school during any year on the nomination by the county superintendent of supervising principals or principals; act not later than four weeks before the close of school during any year on the nominations by the county superintendent of all other members of the instructional staff; and act on the nomination by the county superintendent of all other employees in such schools.

The county superintendent generally becomes aware of pending vacancies on his instructional and administrative staff before they actually become effective.

In order to insure the continued smooth operation of the county school system, the superintendent should recommend a person to fill a position as soon as he knows that it will be vacant, notwithstanding the fact that the vacancy does not yet actually exist.

The statute quoted above anticipates this situation and requires the county school board to act on the nominations of the county superintendent not later than six weeks before the close of school.

On the basis of the above, it is the opinion of this office that question 2 be answered in the affirmative.

AS TO QUESTION 3:

Section 230.43(2), F. S., *nominations of other members of the instructional staff*, states as follows:

To consider recommendations of the supervising principal or the principals of the schools in the district and the county superintendent regarding the nomination of teachers and other members of the instructional staff to serve in the schools and to make nominations for such positions to the county board; providing, that all nominations for reappointment of members of the instructional staff shall be submitted to the county board *at least six weeks* before the close of school. (Emphasis supplied.)

The same reasoning applies to questions 2 and 3. Therefore, on the basis of this reasoning and the above cited statute, it is the opinion of this office that question 3 be answered in the affirmative.

064-101—July 24, 1964

COUNTY FINANCES

JUVENILE WELFARE BOARD BUDGET; AUTHORITY OF COUNTY COMMISSION TO DELETE ITEMS—CHS. 23483, 1945; 31171, 1955; 61-2675, 61-2665, LAWS OF FLORIDA—CH. 129; §§129.01, 129.03(2)(a), F. S.

To: Page S. Jackson, Pinellas County Attorney, Clearwater

QUESTIONS:

1. Where the juvenile welfare board is required to submit to the Pinellas county board of county commissioners an annual budget "upon the basis of necessity," may such budget include a substantial sum for contingencies?

2. May the juvenile welfare board legally contribute funds in a lump sum to certain private agencies which are engaged in activities related to juvenile welfare?

The juvenile welfare board was created by Ch. 23483, 1945, and amended by various acts, among them Ch. 31171, 1955, and Ch. 61-2675.

Pertinent portions of Ch. 31171, as amended, are:

Section 3. The board of county commissioners is directed to levy a tax each fiscal year to be used as an appropriation for the juvenile welfare board in accordance with its needs. Said appropriation shall be determined as follows:

(1) Each year the juvenile welfare board shall submit the budget from the preceding year and certify the modifications made upon said budget for the ensuing year upon the basis of necessity. (Emphasis supplied.)

If in the judgment of the board of county commissioners of Pinellas county the juvenile welfare board during the year 1961, or any subsequent year, needs additional funds to further its purposes and its work, then said board of county commissioners is hereby authorized to furnish such additional funds to the juvenile welfare board from its contingency or other reserves.

I have emphasized the words "needs" and "necessity," because the county commission is directed to levy a tax "in accordance with its need" and the budget to be submitted by the board to the commission shall be certified "on the basis of necessity."

Webster's twentieth century dictionary defines need as an emergency, something urgently needed, a necessity, and defines necessity as an absolute need, the quality of being indispensable.

A contingency, on the other hand, is some future event which may or may not occur (*Devin v. McCoy*, 48 Ind. App. 379, 93 N.E. 1013). See also other similar definitions in 9 Words and Phrases 188.

Under Ch. 129, F. S., there appears the following in §129.01, F. S., referring to the preparation of the county budget: "The appropriation division of the budget shall include itemized appropriations for all expenditures authorized by law, contemplated to be made or incurred for the benefit of the county during the said year, and provision for the reserves authorized by this chapter."

And in §129.03(2)(a), F. S.: "The board of county commis-

sioners shall receive and examine the tentative budget for each fund and shall require such changes to be made as it shall deem necessary. . . ."

In light of the law cited above and the definitions of key words in the acts governing the budget of the juvenile welfare board, it is my opinion that the Pinellas county board of county commissioners may require such changes as it deems necessary in the budget submitted by the juvenile welfare board.

Question 2 asks if the juvenile welfare board may legally contribute funds in a lump sum to certain private agencies which are engaged in activities relating to juvenile welfare, and if not, may the board of county commissioners delete such sums from the budget of the juvenile welfare board.

Expenditures of county funds are rigidly controlled by statute. I find no provision in the law for a county to allocate public tax funds to private agencies. Funds of the juvenile welfare board are controlled as other county funds are; therefore, the juvenile welfare board may not legally contribute public funds in a lump sum to private agencies, and the inclusion of such items in a budget submitted to the county commission may properly be deleted.

Pinellas county was removed from the control of any budget commission law by Ch. 61-2665, a local act.

064-103—July 28, 1964

PUBLIC RECORDS

CONFIDENTIALITY OF SOCIAL SECURITY RECORDS IN HANDS OF VOCATIONAL REHABILITATION COUNSELORS—§§229.25 ET SEQ., F. S.

To: *Paul E. Speh, Director, Workmen's Compensation Division,
Florida Industrial Commission, Tallahassee*

QUESTION:

Where the custodian of social security and vocational rehabilitation records and documents is served with a subpoena requiring that he testify or produce copies concerning such records and documents, what procedure should be followed?

Vocational rehabilitation counselors in the course of administering the vocational rehabilitation program pursuant to a state plan approved by the federal government, utilize social security information received from the department of health, education and welfare. (See §§229.25 et seq., F. S., vocational rehabilitation laws of Florida.) Such information may include information assembled by the federal social security administration; confidential internal communications; confidential communications between applicants and their physicians and similar information necessary for making initial disability determination of applicants for social security disability benefits. The Florida vocational rehabilitation agency is reimbursed 100% by the social security administration for the performance of these services.

In the performance of said disability determination services, the personnel of the Florida vocational rehabilitation agency acts as agent of the social security administration of the federal government. The information and records, the personnel of the Florida

vocational rehabilitation agency acquires and assembles in the course of making these social security disability determinations are, in fact, federal records.

Title 42 U.S.C.A. 1306, provides that all social security records and information relating to claims may not be disclosed except as such disclosures are expressly authorized by regulations promulgated by the secretary of the department. The regulations of the department which are set out in title 20, code of Federal regulations, §401.1 et seq. *do not* expressly authorize disclosure of social security information in records in possession of vocational rehabilitation counselors. The prohibition against unauthorized disclosure of information assembled for social security eligibility determination purposes is so strong that "any person" who makes an unauthorized disclosure of such information is subject to criminal prosecution and may be fined up to \$1000 or imprisoned up to 1 year.

In a recent case involving an attempt to prosecute for contempt of court an employee of the social security administration who refused to disclose information in a social security record, it was held that the employee acted properly in declining to make the disclosure and was not subject to punishment for contempt of court. In re: Mengel, 201 F. Supp. 687, (U.S.D.C. W.D. Penn. 1962). Similarly, in the case of Hubbard v. Southern Railway Co., 179 F. Supp. 244 (U.S.D.C. M.D. Ga. 1959), where the records of the railroad retirement board were sought to be subpoenaed in a private suit, the confidentiality of the records was upheld under the statute and regulations comparable to those here involved.

We are advised that the office of the U. S. commissioner of the vocational rehabilitation administration recently transmitted a release to the various agencies utilizing social security information on the subject of confidentiality of such information (Commissioner's letter #64-30). In addition, the social security administration also transmitted a release concerning disclosure of medical information. (SSA disability insurance letter #II-15). The foregoing releases indicate that while the regulations permit the release of the information to vocational rehabilitation agencies such disclosures are made only for the proper administration of the vocational rehabilitation program. It is also pointed out in the social security release as follows:

... It is the position of this Department, sustained by the Attorney General of the United States and several courts which have had the issue before them, that the provisions of the law and regulations pertaining to the confidentiality of information obtained in this program apply even where such information is sought by subpoena.

The foregoing releases also offered suggestions to vocational rehabilitation agencies and officers served with subpoenas for protection of social security information. We feel that these suggestions are both pertinent and helpful to the disposition of this inquiry and hereinafter set forth the same as a guide to be followed by these agencies in similar circumstances.

... If a subpoena has already been served, the State agency should immediately notify the Social Security Regional Representative, preferably by telephone. The regional representative should be furnished the name, address, and social security account number of the claimant, the names and addresses of the attorney or attorneys in the

matter, the court or administrative body before which the case is pending, the name and address of the person on whom the subpoena will be or has been served, the date and time of appearance, and any other pertinent information. The regional representative will immediately notify the regional attorney, who may be able to dissuade the person from seeking a subpoena, or secure the withdrawal of a subpoena which has been served, by explaining the law and precedent decisions on this point. The regional office will advise the individual served with the subpoena on the course of action he should take. If efforts to prevent issuance or to secure withdrawal of the subpoena are not successful, the individual served will make the necessary appearance and will be represented by a government attorney. If the records referred to in the subpoena are not in his custody (i.e., he is a State agency employee and the file is in the Division of Disability Operations) he will testify to that fact. If the records are in his custody, he will, with the assistance of the government attorney, respectfully decline to produce or to testify concerning such records and will direct the court's or presiding officer's attention to Section 1106 of the Social Security Act and Regulation No. 1.

In the light of the foregoing, it is my opinion that in responding to a subpoena concerning social security records and documents the vocational rehabilitation counselors should utilize the foregoing procedure as a guide. Your question is, therefore, answered accordingly. To the extent that this opinion may be in conflict with AGO 060-118, July 21, 1960, the instant opinion shall control and supersede the same.

064-104—July 28, 1964

TAXATION

SETTLOR'S RESERVED RIGHT TO REVOKE A TRUST— INTANGIBLE PERSONAL PROPERTY TAX—CH. 199, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is a power to revoke or amend a trust agreement, reserved to the grantor and one or more of the trustees acting jointly, not requiring the consent of the beneficiaries, intangible personal property within the purview of Ch. 199, F. S., and subject to taxation?

Under the trust agreement here involved the owner of certain property, consisting primarily of intangible personal property which, by reason of the grantor's domicile being in Florida, had its situs in Florida, at the time of the making of the said trust agreement, vested title to the said property in two trustees, one a national banking institution having its principal place of business in Oklahoma and the other an individual domiciled in Oklahoma, in trust, with "power to manage and contract with respect to the trust estate, all in the same manner and to the same extent as grantor could do had grantor owned the trust estate individually," together with certain other powers mentioned in the said trust

agreement to be exercised in the administration of the trust estate. The corporate trustee is given custody of the estate books of account, securities, instruments, papers and other documents of the trust and has the obligation of keeping proper account records of the trust estate.

During the lifetime of the grantor 85% of the income of the trust is payable to the grantor and 15% to the William K. Warren foundation, an Oklahoma corporation. Provision is also made in the trust agreement for the children of the grantor, evidently from the grantor's 85% of the income of the trust, and for the distribution of capital assets to the grantor when "necessary or advisable for the health, happiness, maintenance, welfare and comfort of grantor."

Subsection 1, of §V of the trust agreement, contains the following power to revoke the trust agreement, to wit:

Notwithstanding any other provisions hereof, this declaration of trust and the trust hereby created shall be revocable at any time by grantor with the written consent of (a) the individual co-trustee who then is in office, or (b) the corporate trustee if the office of individual co-trustee is vacant.

Upon delivery of the revocation document to the corporate trustee "all property then held in trust shall revest in grantor free from and discharged of this trust and the trustee is hereby directed in such event to transfer and convey such property immediately to grantor and this trust thereby shall terminate." Provision is also made in subsection 2 of said §V of the said trust agreement for amending the said trust agreement upon the written consent of grantor and one of the co-trustees. Neither of these powers to revoke or amend the said trust agreement has yet been exercised, so that title to the trust properties is now vested in the trustees subject to the terms and conditions of the trust agreement.

A similar provision for revocation or amendment of a trust agreement was upheld by the court in *Reinecke, Collector of Internal Revenue, v. Smith*, 289 U. S. 172, 53 S.Ct. 570, 77 L.Ed. 1109, in litigation involving income taxes. In this case the court said that "the measure of control of corpus and income retained by the grantor was sufficient to justify the attribution of the income of the trust to him" under a federal statute providing "that where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor." The rule announced in *Reinecke v. Smith*, supra, being based on a federal statute, is not necessarily applicable for purposes of intangible personal property taxes under Ch. 199, F. S.

Where a trust is valid and of such a nature that the statute of uses does not execute the use, the trustee is the holder of the legal title and the cestui que trust takes the equitable estate of beneficial interest (90 C.J.S. 59, §175.54 Am. Jur. 46 and 47, §35). The vesting of title in the trustee is not affected by a reservation by the settlor of the power to terminate the trust or to control investments under certain circumstances, and the fact that the trustee cannot sell without consent of the beneficiary does not destroy his power of disposition so as to deprive him of the legal title. (90 C.J.S. 68 and 69, §180; 54 Am. Jur. 40 and 41, §26).

The provision in the trust agreement for revocation thereof by the grantor or settlor and a trustee, without the consent of the beneficiaries, did not prevent the legal title to the trust properties vesting in the trustee and the equitable title in the cestui que trustants or beneficiaries. The grantor's reservation of the power to revoke the trust does not affect the right of his creditors or enlarge his estate. (90 C.J.S. 129, §202).

The provisions for revocation or amendment contained in the trust agreement before us did not divest the trustees of their legal title to the property and assets of the trust, nor did it prevent the vesting of such title in the trustees in the first instance. Such provisions for revocation and amendment put it within the power of the grantor with the concurrence of a trustee to terminate the trust and cause the title to the said property to revert in the said grantor; however, until revocation has been accomplished title remains in the trustees. Such title is subject to taxation in the name of said trustees until revocation and retransfer to the grantor, or some other person, is completed.

Even if we deem the said power of revocation as being within itself an intangible right, having the status of intangible personal property, the true value of such right of revocation, especially where the right may not be exercised except with the concurrence of one of the trustees, would be most difficult of determination, for purposes of taxation, at least so long as the legal title to the property remains vested in the trustees. The intangible property held by the trustees has its situs for tax purposes, at least until revocation is complete, where the said trustees have their domicile, and not where the grantor has his or her domicile.

The above stated question should be answered in the negative, except where it is clear from the trust papers, documents, and other evidence, that the reservation has a fixed and determinable taxable value, and then only upon that value.

064-105—July 28, 1964

TAXATION

TAX EXEMPT STATUS OF LANDS UPON WHICH SPOIL DEPOSIT EASEMENTS HAVE BEEN GRANTED— CH. 14723, 1931, LAWS OF FLORIDA

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are lands encumbered by spoil disposal easements given by landowners to the U. S. in connection with the upkeep and maintenance of the Florida inland navigation district entitled to tax exemption for such lands themselves?

The Florida inland navigation district was created and established by Ch. 14723, 1931, embracing lands in Brevard, Broward, Dade, Duval, Flagler, Indian River, Martin, Nassau, Palm Beach, St. Johns, St. Lucie and Volusia counties. This act provided for a governing board for the said district, set out its powers and authority, and otherwise regulated the administration of the affairs of the district. The primary purpose of this act was to procure an existing canal running from the Georgia boundary to the Miami

area in Dade county, and to provide for and furnish rights of way, spoil areas, etc., for use by the federal government in connection with its administration, extension and widening of the said canal. In this connection the board is required to "acquire or obtain by gift, donation, purchase or by condemnation and shall furnish free of cost to the United States of America suitable areas for the deposit of dredged material in connection with the work of improving and/or constructing the" canal and in connection with the upkeep and maintenance thereof. This authority would seem to include the obtaining of deposit or spoil areas for depositing spoil and dredged materials taken from the right of way and from the canal itself in connection with the upkeep, maintenance and expansion of the canal.

In some instances the fee title to spoil areas is obtained and conveyed to the U. S., while in other instances leasehold interests or easements are obtained, leaving the fee title vested in the landowner, subject, however, to the lease or easement rights. These leasehold and easement rights are transferred to the U. S. In an easement, a copy of which we have been furnished, the owners of the land granted it to the U. S. for spoil area purposes and/or right to deposit spoil and dredge materials thereon, commencing Sept. 1, 1963, and ending Aug. 31, 1965. Easements, as well as leasehold interests, appear to be interests in the land upon or concerning which the same are granted. In the instant case the fee title would seem to be vested in the landowner and the leasehold interest or easement in the U. S. or the state of Florida. These are separate properties in the same lands. In *Bancroft Inv. Corp. v. Jacksonville*, 157 Fla. 546, 27 So.2d 162, it was held that a parcel of land, sold by the U. S. to a purchaser, under a contract for sale and conveyance, was subject to taxation against the purchaser, to the extent of his right, title or interest in the land, so long as the rights and interests of the U. S. are protected. This appears to have been the view of the U. S. supreme court in *S.A.R. Inc., v. Minnesota*, 327 U. S. 558, 66 S.Ct. 749, 90 L.Ed. 851. We feel that the fee title of lands leased or otherwise let by its owner to the U. S., or the state of Florida, for use in depositing spoil and dredge materials in connection with the upkeep, repair, extension and maintenance of the Florida East Coast canal, is subject to taxation, notwithstanding the interest of the U. S. or the state of Florida therein as aforesaid, so long as the interest of the U. S. or the state of Florida is excluded from the said assessment and taken into consideration in fixing the value of the land.

064-106—July 28, 1964

TAXATION

EXCISE TAX ON GASOLINE OR LIKE PRODUCTS— APPLICATION OF \$208.45, F. S., TO MILITARY RECREATIONAL FACILITIES

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is the special services division of the U. S. naval station, Mayport, a department, agency or instrumentality of the U. S., within the purview of \$208.45, F. S., insofar as the maintenance of the recreational facilities of the said naval station is concerned?

Said §208.45, F. S., provides that "each and every dealer in gasoline or other like products of petroleum by whatever name designated shall be exempt from the payment of any and all excise taxes upon gasoline or other like products of petroleum sold by such dealer in the state to the United States, its departments, agencies and instrumentalities . . . in bulk lots of not less than five hundred gallons in each delivery to and for the exclusive use by the United States, its departments, agencies and instrumentalities. . . ."

First, we come to the question of what is included in the phrase "United States, its departments, agencies and instrumentalities," as used in said §208.45, and especially whether "the Special Services Division of the" said naval station is a department, agency or instrumentality of the U. S. Army post exchanges, and similar instrumentalities in other divisions of the armed services of the U. S., have been held to be instrumentalities of the U. S. (Standard Oil Co. v. Jackson, 316 U. S. 481, text 485, 62 S.Ct. 1168, 86 L.Ed. 1611, text 1615; Paul v. U. S., 371 U. S. 245, 83 S.Ct. 426, 9 L.Ed. 292, text 303; 6 C.J.S. 561, §104; Ann. in 140 A. L. R. 632). In Paul v. U. S., supra, the court remarked that military "commissaries are 'arms of the government deemed by it essential for the performance of governmental functions' and 'partake of whatever immunities' the armed services 'may have under the Constitution and federal statutes.'"

Captain C. H. Turner, U. S. navy commanding officer of the U. S. naval station, Mayport, in his letter of July 13, 1964, advises that "recreational facilities are necessary to maintain the morale, efficiency and welfare of military personnel in the armed forces. These facilities consist of beaches, picnic grounds, swimming pool, hobby shops, movie theatre, library, golf course, baseball diamonds, bowling alleys, football fields and other types of recreational facilities." Captain Turner further advises that "to maintain the recreational facilities at Mayport, Florida, the Special Service Department uses three tractors, two pick up trucks, two station wagons and approximately 25 gasoline powered lawn mowers. . . ." He further advises that the title to such tractors, pick up trucks, station wagons, and lawn mowers is vested in the U. S. or an agency thereof.

In the light of Standard Oil Co. v. Jackson, supra, and Paul v. U. S., supra, and other authorities examined by us, we are of the opinion that the gasoline sales mentioned in your request for opinion, and in Captain Turner's letter, are gasoline sales to the U. S., or its department, agency or instrumentality within the purview and intention of §208.45, F. S.

064-107—July 29, 1964

CRIMINAL PROCEDURE

FURNISHING STATEMENTS AND CONFESSIONS TO ACCUSED—§§925.05, 909.04, F. S.

To: *Sylvester P. Adair, Justice of Peace and Judge, Small Claims Court, Homestead*

QUESTION:

Does §925.05, F. S., require the prosecution, during a preliminary hearing, to provide the defendant with copies of incriminatory statements which he previously made?

Section 925.05, F. S., reads as follows:

Where a person is charged with an offense, upon motion of such person, at any time after the filing of the indictment or information against him, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph written or recorded statements or confessions whether signed or unsigned by the defendant. The order shall specify the time, place and manner of making the inspection and of taking copies, or photographs, and may prescribe such terms and conditions as are just.

Except for the provisions of this section, the accused has no basic right to examine incriminatory statements which are in the possession of the prosecution. *Lampp v. State*, 155 So.2d, 10. It is clear from a reading of §925.05, supra, that its provisions only require the prosecution to furnish statements to the accused after he has been charged by indictment or information. Therefore, where an accused is brought before a committing magistrate prior to being charged by an information or indictment, there is total absence of any authority requiring the prosecution to permit the defense to examine statements made by the accused. It must follow, therefore, that your question has to be answered in the negative where the accused being presented to the committing magistrate is not under a charge set out in an indictment or information.

Preliminary hearings held after the filing of an information or indictment are held before the trial court. See §909.04, F. S. At such hearings, the defense would be entitled to examine the defendant's statements or confessions.

064-108—July 31, 1964

REGULATION OF PROFESSIONS AND VOCATIONS

INTERPRETATION OF §477.17, F. S., COSMETOLOGY LAW

To: *Mrs. Juanita W. Saunders, Executive Secretary, State Board of Cosmetology, Tallahassee*

QUESTIONS:

1. Does §477.17(1)(a), (b), (c) and (d), F. S., provide that if an applicant fails to pass an examination, he is required to pay an additional fee for the next examination?

2. In the absence of legislative authority, does the state board of cosmetology have the authority to charge a fee to cover the processing of the transfer of a student from one school to another?

Section 477.17(1)(a), (b), (c) and (d), F. S., provides as follows:

(1) The fees to be paid by the various applicants and to be collected by the state board of cosmetology for the various examinations to be given, for the issuance of the various certificates of registration, for the renewal of the unexpired certificates, and for the restoration of expired certificates, are as follows:

(a) For an examination to determine the qualifica-

tions of an applicant to practice cosmetology, forty-five dollars.

(b) For an examination to determine the qualifications of an applicant to practice cosmetology as a cosmetologist, thirty-five dollars.

(c) For an examination to determine the qualifications of an applicant to practice cosmetology as a junior cosmetologist, fifteen dollars.

(d) For an examination to determine the fitness of an applicant to practice as a manicurist and pedicurist, fifteen dollars.

AS TO QUESTION 1:

In view of the foregoing, it appears that *an* examination may be construed as referring to one examination only, therefore, question 1 is answered in the affirmative.

AS TO QUESTION 2:

I believe that the power to fix charges for services to be rendered is legislative in nature (see *Storrs v. Pensacola*, 11 So. 226; *Florida Motor Lines, Inc. v. Railroad Commission*, 129, So. 876; also AGO 059-249). In other words, until the legislature either prescribes a fee to be charged for such purposes or specifically authorizes your board to fix such a reasonable fee, I do not believe that it may do so by administrative rule or regulation. Question 2 is answered in the negative.

064-110—August 3, 1964

REGULATION OF PROFESSIONS AND VOCATIONS

SANITARIANS' REGISTRATION BOARD—AUTHORITY OF EX OFFICIO MEMBER TO DELEGATE AUTHORITY—

§491.03, F. S.

To: *B. C. Pafford, Sanitarians' Registration Board, Gainesville*
QUESTION:

Can the state health officer, who is an ex officio member of the sanitarians' registration board, delegate his authority to another to officially represent him at the meetings of the board?

Section 491.03, F. S., which creates the sanitarians' registration board, provides, among other things, that the governor shall appoint 5 members and that the state health officer shall be an ex officio member of the board.

An ex officio member of a board has been defined as one who is a member by virtue of his title to a certain office, without further warrant or appointment. In *Southern Electric Generating Co. v. Howard*, 156, So.2d 359, the court said that ex officio members of a public body are members for all purposes and must be counted in determining the presence of a quorum. The court further stated:

We can see no logical reason nor has one been presented to us why an ex officio member of a representative body should not have . . . all of the authority of the other members. In the one case his power and authority as such member is conferred upon him by that department of sovereignty having the authority to create the board because of the fact of his holding some office while the other members receive their power and authority because of their appointment in the same manner provided by the same governmental department. (Legislative.)

Inasmuch as it appears, in the absence of a statute to the contrary, that the state health officer as an ex officio member of the board has the same authority as the other members, he may not delegate or confer his official authority upon anyone else. (See 1 Fla. Jur., Adm. Law, §76.)

Your question is answered in the negative.

064-111—August 3, 1964

PUBLIC FUNDS

INVESTMENT AND DEPOSIT OF SCHOOL FUNDS—§§136.01, 136.02, 236.074, 236.24, 236.30, 236.55, 237.27, 237.32, 665.44, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. May funds of boards of public instruction be invested in federal and state savings and loan associations' share accounts?

2. If question 1 is answered in the affirmative, what is the security required of such savings and loan associations, including the insurance coverage in the federal savings and loan insurance corporation?

3. Does the answer to question 2 remain the same when the boards of public instruction invest funds of several different school accounts under their supervision and control?

4. Are the terms "investment" and "deposit" of school and school district funds synonymous and, if not, when may such funds be invested and when deposited?

Section 665.44, F. S., insofar as here material, provides that "any and all boards of county commissioners, . . . county boards of public instruction . . . and all other county and other taxing units, officers and officials, by whatever name known, having the custody, control, supervision, management or authority to invest any fund or funds of any county, school district, special tax school district, . . . may *invest* any such fund or funds in investment share accounts of any federal savings and loan association, chartered under the laws of the United States, and doing business in the state, and in the shares of any Florida building and loan association, which is a member of the federal home loan bank system, provided that the investments authorized in this section are limited to the extent that the same are insured by the federal government or an instrumentality thereof." (Emphasis supplied.)

Section 237.32, F. S., requires that "the tax collector, the clerk of the circuit court, the county superintendent, and all other persons having or receiving, or collecting any money payable to the several school funds of the county or of the districts, shall pay the same to the bank or banks selected by the county board of public instruction to receive the funds for that purpose . . ." Such depositories must be banks qualified as county depositories under §§136.01, et seq., F. S. This section seems to relate to the *deposit of funds* and not to the *investment of funds*.

Section 236.074, F. S., makes provision for the *investment of funds* in the school construction fund of any county, not required for current use, in the manner "provided by law for the investment of other funds in the county school fund . . ." Section 236.24,

F. S., provides for the *investment* of "county current school funds in bonds of the United States government or any bonds fully and unconditionally guaranteed as to interest and principal by the United States government, in bonds of special school tax district number one of the same county, state board of education bonds of any county, or loans of the county board incurred under the provisions of section 237.27 F. S." Section 236.30, F. S., provides for the *investment* of district current school funds in the same securities as those mentioned in said §236.24, F. S. Section 236.55, F. S., provides for the *investment* of county school district interest and sinking fund funds in substantially the same securities as those mentioned in said §236.24, F. S.

In AGO 063-41, of Apr. 12, 1963, p. 5 this office commented as follows:

In *McCrory Stores Corp. v. Tunncliffe*, 104 Fla. 683, 140 So. 806, text 807, the court said that "the term 'deposit' when used in connection with banking transaction denotes a contractual relation between one who delivers money or a thing to a bank which receives it with the implied agreement on the part of the bank that the deposit will be paid out on the order of the depositor or returned to him on demand." The courts, in *Brooke v. White*, 219 Iowa 624, 258 N.W. 766, text 767; *Fay v. Fay*, 172 Md. 570, 193 A. 674; and *State v. McFetridge*, 84 Wis. 473, 54 N.W. 1, 20 L.R.A. 223, recognized a distinction between a 'deposit' and an 'investment.' In *Fay v. Fay*, supra, the court said that 'there is a distinction between a *deposit*, which ordinarily is a mere incident of custody, and an *investment*, which involves converting the assets of the estate into a different form.' In *State v. McFetridge*, supra, the court held a deposit of moneys in a bank *not to be* an investment, but a deposit. In *Brooks v. White*, supra, the court said that the controlling consideration in determining if funds deposited in a bank are a 'deposit' rather than an 'investment' is whether the depositor has an absolute right to withdraw such funds on demand, and not whether such funds are not to draw interest. See also cases cited in 12 Words and Phrases 237, distinguishing investments from deposits. Section 665.43, F. S., relates to investments, and not to deposits of public municipal funds. (Emphasis supplied.)

The provisions of §665.44, F. S., relate to *investment* of public funds, as do §§236.074, 236.24, 236.30 and 236.55, F. S. Section 237.32, F. S., relates to the *deposit* of public funds. *Investment of public funds, and deposits of public funds* are not synonymous and interchangeable terms, unless declared to be so by statute in or under particular circumstances. By the use of the provision in §665.44, F. S., that county public school officials "may *invest* any such fund or funds in investment share accounts of any federal savings and loan association . . . and in the shares of any Florida building and loan association . . ." it is evident that said section relates to "investments" of public funds, and not to *deposits* of such funds. We find no provision authorizing the "deposit" of such public funds in such savings and loan associations, and in building and loan associations. The statutes hereinabove mentioned seem to make provision for both the "deposit" of public funds and the "investment" of public funds. (Emphasis supplied.)

The usual distinction between a *deposit of funds* and an *investment of funds* seems to be the control of the depositor or investor over the funds after they have been deposited or invested. Generally where the depositor or investor may withdraw the funds merely on demand, or whether notice must be given before such funds may be returned to the depositor or investor, if notice is required, there is an investment instead of a deposit. (Brooke v. White, 219 Iowa 624, 258 N.W. 766; Andrew v. Iowa Savings Bank, 214 Iowa 105, 241 N.W. 412; Fay v. Fay, 172 Md. 570, 193 A. 674; Gross v. Butler, 48 Ga. App. 750, 173 S.E. 866; Louisville Trust Co. v. Commissioners of Sinking Fund, 260 Ky. 219, 84 S.W. 2d 30; Jones v. O'Brien, 58 S. D. 213, 235 N.W. 654; State v. Marron, 18 N. M. 426, 137 P. 845).

In *McCrory Stores Corp. v. Tunnicliffe*, 104 Fla. 683, 140 So. 806, text 807, it was held that the term "deposit" denotes contractual relation between one delivering money or thing to bank and bank receiving it with implied agreement to pay it out on depositor's order or return it to him on demand. In *First American Bank and Trust Co. v. Palm Beach*, 96 Fla. 247, 117 So. 900, text 903, we find the statement that "a deposit is for the benefit of the depositor, a loan for the benefit of the borrower. It is true, a deposit may also benefit the depository but such is not the primary object of the transaction." See also *Miami v. Shutts*, 59 Fla. 462, 51 So. 929, text 931. The word "investment" often "involves the idea of intended profit, and implies the contractual relation of purchaser and seller or borrower and lender, and a certain measure of permanence, in contrast to a speculation or temporary venture" (48 C.J.S. 760). In Black's law dictionary the word "invest" is defined as "to loan money upon securities of a more or less permanent nature, or to place in business ventures or real estate, or otherwise lay it out, so that it may produce a revenue or income," and the word "investment" as "the placing of capital or laying out of money in a way intended to secure income or profit from its employment."

There appears to be a distinction between the *investment* of the public funds mentioned in §§236.074, 236.24, 236.30, 236.55 and 665.44, F. S., and the *deposit* of public funds under Ch. 136, F. S. In *Porter v. Aetna Casualty and Surety Co.*, 370 U. S. 159, 82 S.Ct. 1231, 8 L.Ed. 2d 407, the exempt status of benefits paid by the United States veterans' administration to a veteran and by him invested or deposited in a federal savings and loan association, under §3101(a), title 38, of the U.S.C. was involved. We gather from this opinion that the court deemed the question of whether the said funds so invested or deposited had "the quality of moneys" the controlling factor in the case. The court found that it was the policy and practice of the federal savings and loan association, wherein the veteran's funds had been deposited, to repay the funds upon demand, instead of requiring prior notice of an intention to withdraw such funds, thereby giving them "the quality of moneys" and therefore within the statute exempting the veteran's funds from execution and other legal process. In the course of its opinion the court remarked that "under the law the depositor is a shareholder rather than a creditor, and his deposits are subject to withdrawal only after a 30 day demand." In *Wisconsin Bankers Ass'n v. Robertson*, DC D. C., 190 Fed. Supp. 90, text 92, the court refers to savings accounts in federal savings and loan associations as "the monetary interest of the holder thereof in the capital of a

federal association and consists of the withdrawal value of such interest." This case was affirmed by the Court of Appeals in 294 Fed. 2d 714, and certiorari was denied in 368 U. S. 938, 82 S.Ct. 381, 7 L.Ed. 2d 338.

By the weight of authority the maturity of a member's stock in a building and loan association, or in a savings and loan association, or the purchase of such stock and the payment therefor, although he may, in a qualified sense, become a creditor of the association, his status is not changed from that of a member or stockholder to that of a general creditor. Section 665.44, F. S., merely authorizes the *investment* of the funds mentioned in said section, which term does not seem to extend to and include deposit of their funds; said section does not authorize the *deposit* of such funds with federal savings and loan associations. Section 237.32, F. S., above-mentioned, relates to school taxes and funds collected by the tax collector and clerk of the circuit court, and provides for their "deposit" in county depositories; these funds may not be *invested* in federal savings and loan associations, the deposit of such funds only being authorized and such deposits are required to be in the county depositories. Sections 236.074, 236.24, 236.30 and 236.55, F. S., authorize the investment of the funds therein mentioned in the securities therein mentioned. These statutes authorizing the investment, and not deposit of such funds, such funds would appear to be within the letter of said §665.44, F. S.; however, such investments under said section are subject to the limitations of said section that such investments "are limited to the extent that the same are insured by the federal government or an instrumentality thereof." The requirements of §136.02, F. S., necessary for the qualification of county depositories does not seem to have any application to investments under said §665.44, F. S.

Questions 1-4, stated herein are answered as follows:

1. Funds of boards of public instruction within the purview of §§236.074, 236.24, 236.30 and 236.55, F. S., are within the letter of §665.44, F. S.; however, funds within the purview of §237.32, F. S., are not within the letter of said §665.44, F. S., and may not be deposited or invested under or pursuant to said §665.44.

2. Section 665.44, F. S., requires no security other than that provided in the form of insurance by the "federal government or an instrumentality thereof." However, no investment of funds in excess of the insurance coverage should be made under said §665.44 under present existing statutes.

3. The answer to question 2 remains the same when the board of public instruction invests funds of the several different school accounts under its supervision and control. No investment under §665.44, F. S., should exceed the insurance coverage mentioned in said §665.44.

4. The terms "investment" and "deposit" of §§236.074, 236.24, 236.30 and 236.55, F. S., and of Ch. 136, and §237.32, F. S., are not synonymous and interchangeable terms. Said §§236.074, 236.24, 236.30 and 236.55 provide for the investment of certain school funds, and §237.32, provides for the deposit of school funds in county depositories.

5. The investments authorized under §665.44, F. S., are additional and cumulative to other investments authorized by law for funds of county school boards.

6. Before investing school funds under said §665.44, F. S., county school boards should discuss with their attorney the effect,

if any, of §10, Art. IX, State Const., on the particular investment to be made.

7. Some question has arisen as to the administration and protection of school lunch funds, funds derived from sports, such as football, baseball, etc., games and other like and similar sources. The state board of education, as well as county boards of education, may in their discretion adopt rules and regulations for the protection of such funds.

064-112—August 3, 1964

LICENSES AND LICENSE TAXES

SECTION 205.59, F. S.—MUNICIPAL OCCUPATIONAL LICENSE TAXES—§205.02, F. S.; CH. 61-295, LAWS OF FLORIDA

To: *Wilson Carraway, President, The Florida Senate, Tallahassee*
QUESTION:

What license taxes, if any, may municipal corporations impose upon wholesalers who transact a wholesale business from vehicles operated by them in such municipalities and have their place of business elsewhere?

We are primarily interested in this case with soft drink bottlers and similar businesses who sell their drinks and other wares at wholesale from vehicles owned and used by them for the purpose of making sales and delivery of such drinks and other wares. For instance, soft drink bottlers having their principal places of business in Tallahassee, Leon county, wholesale such drinks and other wares from vehicles owned and operated by them to customers in Woodville, Wakulla, St. Marks, Newport, Crawfordville, Sopchoppy and elsewhere, such sales being made from their said vehicles.

Section 205.59, F. S., requires that every person, firm or corporation engaged in the business of trading, buying, bartering, serving or selling tangible personal property shall pay a license tax of \$10, with certain exceptions not here material. This \$10 tax is a state tax, under §205.02, F. S.; a county, as well as a municipal, license tax, not to exceed 50% of the state tax, may be imposed under §205.02, F. S., "except as otherwise authorized by law." The said exception relates primarily to provisions in municipal charters making their own provision as to the amount of such municipality's license taxes, which may in instances exceed the 50% of the state tax.

Said §205.59 contains the provision that "vehicles used by any person for the sale and delivery of tangible personal property at wholesale from his established place of business on which a license is paid shall not be construed to be a separate place of business and no license may be levied on such vehicles or the operators thereof as salesmen or otherwise by the state, county or municipality, any other law to the contrary notwithstanding." (Emphasis supplied.) A bottler's vehicle from which soft drinks are sold at wholesale would appear to be within the purview of this portion of said §205.59, F. S. This provision was construed by the Sup. Ct. of Florida, in *American Bakeries Co. v. Haines City*, 131 Fla. 790, 180 So. 524. In this case one bakery company owned and operated a bakery plant in Orlando, Orange county, and another in Lakeland, Polk county, from which they sent out vehicles loaded with bakery products which were sold at wholesale from such vehicles, including the making of such wholesale sales from such

vehicles to customers in Haines City, which city attempted to impose license taxes against such bakery companies for the privilege of making such sales from such vehicles in said city. The court held that said §205.59, F. S., was applicable, the same being the latter law to like or similar provisions in the charter acts of the city of Lakeland. Said section was amended by §2, Ch. 61-295, said amendment leaving intact the exemption provision relative to vehicles mentioned above. Said Ch. 61-295 appears to have become effective on June 22, 1961.

Said §205.59, F. S., as amended on June 22, 1961, is controlling here unless the legislature by subsequent law has expressly provided, contrary to said §205.59, F. S., for the imposition of a license tax upon such vehicles or the person, firm or corporation operating them.

064-114—August 3, 1964

FLORIDA EGG COMMISSION

OFFICIAL MEETINGS OF COMMISSION—VOTING BY
PROXY—CH. 504, §§504.02, 504.06, 103.121, 298.11,
608.10, 619.06, F. S.

To: *Carl L. Binger, Manager, Florida Egg Commission, Tampa*
QUESTION:

Are members of the Florida egg commission, who are unable to attend a meeting thereof, permitted to vote by proxy upon matters coming before the commission?

Chapter 504, F. S., which creates and regulates the Florida egg commission, is silent as to the specific subject of your inquiry. However, §504.02 thereof provides that a majority of the members shall constitute a quorum for the transaction of all business of the commission and the carrying out of the duties of said commission. Section 504.06, F. S., provides that the commission may adopt suitable and reasonable rules and regulations for the enforcement of the provisions of Ch. 504.

Inasmuch as administrative agencies (such as the Florida egg commission) are creatures of statute and their power is dependent upon statute, they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common law power, but only such as has been conferred upon them by law expressly or by implication. Consequently, the question in determining whether the commission has a particular power is not what the commission thinks it should do, but what the legislature has said it can do.

I do not find any authority for the commission to conduct its business, except in a properly called meeting with a majority of its members present. Needless to say, a properly called meeting requires that adequate notice and opportunity to attend must be given to all members, as it is only at such regular or special called meeting of the commission that any official business may be transacted. (A cursory search of the statutes fails to reveal that any administrative agency, such as yours, is authorized to use proxy voting in the conduct of the business of the agency, although the statutes do provide for the use of proxies in transacting the business of agricultural associations (§619.06), corporations (§608.10),

drainage districts (§298.11) and political executive committees (§103.121).)

It appears to be a well-settled principle of administrative law, that action by the majority is valid when a statute provides that the authority conferred upon a board or commission consisting of several members may be exercised by a majority of such members, provided such a quorum required to be present by statute is present, even though a minority of those present dissent or do not vote. (See 1 Fla.Jur., Adm. Law, §75; 2 Am.Jur. 2d, Adm. Law, §196; Florida Dry Cleaning Board v. Economy Cash & Carry Cleaners, 197 So. 550; Scott v. State, 143 So. 249; also 148 ALR 327 and AGO 055-229.)

In view of the foregoing, it appears that under no circumstances should any business of the commission be transacted unless there are at least 5 of the 8 members present at the meeting, which is the number necessary to constitute a quorum. Your question is answered in the negative.

064-115—August 10, 1964

REGULATION OF PROFESSIONS AND VOCATIONS

UNAUTHORIZED PRACTICE OF MEDICINE—HEARING AID DEALER OFFERING HEARING AND SPEECH THERAPY—
§§458.13(1), (2)(g), 458.15(2), CH. 458, F. S.

To: *Homer L. Pearson, Director, Florida State Board of Medical Examiners, Miami*

QUESTION:

Does a newspaper advertisement placed by a hearing aid dealer containing the statement "Hearing and Speech Therapy" constitute the unauthorized practice of medicine?

You have submitted a copy of the questioned advertisement which is run by a hearing aid dealer, which ad seeks the patronage of those who suffer from deafness. In the advertisement the dealer seeks to sell, fit, and service hearing aid instruments. In addition, the advertisement contains the statement "Hearing and Speech Therapy."

The medical practice act, §458.13(1), F. S., contains the following definition of the practice of medicine:

Any person, except as hereinafter provided, shall be deemed to be practicing medicine within the purview of this chapter, who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, or who shall offer or undertake, by any means or method, to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition.

Section 458.15(2), F. S., provides:

It shall be unlawful for any person not holding a lawfully issued license then in full force and effect, authorizing him to practice medicine to:

(a) Practice or advertise to practice medicine;

Section 458.13(2)(g), F. S., expressly exempts persons in the following category from the purview of the medical practice act:

Any person or manufacturer who, without the use of drugs or medicine, mechanically fits or sells lenses, artificial eyes, limbs or other apparatus or appliances, or is engaged in the mechanical examination of eyes for the purpose of constructing or adjusting spectacles, eyeglasses or lenses.

In construing the definition of the practice of medicine, my predecessor had occasion to state in AGO 056-12:

It is evident that under Ch. 458, F. S., any attempt to treat any human disease, pain, injury or physical condition, which would embrace human disability, by any means whatsoever, which would include massage, therapeutic exercises, and the physical, chemical and other properties of heat, light, water and electricity, will constitute the practice of medicine in this state, unless exempt from the operation of the statute.

In the same opinion the definition of "therapy" was given as follows:

Therapy is defined as: 'Therapeutics; healing or curative quality,' and Therapeutics as: 'The department of medical science that treats of remedies for disease and their application. The art and science of healing.' (Funk & Wagnall's New College standard dictionary.)

In addition to the above-cited dictionary definition of the word "therapy," we find that word to be defined in 86 C.J.S. 773 as follows:

While the word 'therapy' means the treatment of disease, and is defined in this sense in Physicians and Surgeons, §1, ordinarily it is used as a compound word, that is, in combination with some other word.

No facts are given or stated in the advertisement indicating what the hearing aid dealer does to accomplish hearing or speech therapy. In the vernacular of practitioners of the healing arts the term "therapy" appears to be used interchangeably with the word "treatment." Under the medical practice act, (§458.13(2)(g), F. S., as above-cited) a hearing aid dealer is authorized to sell, fit, and service hearing aid instruments. However, the offer to perform "therapy" in conjunction with hearing or speech problems would indicate that the dealer in question "holds himself out" as being able to perform or treat matters embraced within the definition of the practice of medicine as set forth in §415.13(1), F. S., above-cited.

Your question is answered accordingly.

064-116—August 13, 1964

TAXATION—LEGISLATION

AUTHORITY OF LEGISLATURE TO ENACT SPECIAL LEGISLATION POSTPONING EFFECT OF COURT DECISION REQUIRING REVALUATION OF TAXABLE REAL PROPERTY IN DADE COUNTY—§20, ART. III, §§11, 11(9), ART. VIII, §1, ART. IX, §7, ART. X, STATE CONST.; §§193.021, 193.06, 193.11, 193.13, 193.22, F. S.; CH. 63-250, LAWS OF FLORIDA

To: Thomas C. Britton, County Attorney, Miami

QUESTIONS:

1. Enact legislation relieving Dade county and its taxing authorities from their obligation to comply with

the decree of the circuit court for Dade county, in the matter of State of Florida, ex rel, DuPont Plaza Center, Inc., v. Irving G. McNayr?

2. Authorize the deferment of the assessment and collection of the taxes involved for a reasonable interval?

3. Authorize the borrowing and spending of the moneys necessary to continue governmental operations after the conclusion of the current fiscal year if question 2 is answered in the affirmative and collection is deferred?

We have examined your request for opinion together with the copy of circuit judge Samuel S. Smith's opinion and order of June 18, 1964, entered in State of Florida ex rel DuPont Plaza Center, Inc. v. Irving G. McNayr, et al., as well as the copy of the peremptory writ of mandamus issued by judge Smith on June 18, 1964, directing that the assessor of taxes for Dade county, as well as other taxing officers of the county, "complete a tax roll for the year 1964 containing all the taxable property in the county, at just valuation, and to thereafter comply with all lawful duties imposed or required of you in regard thereto . . ." (Emphasis supplied.) An appeal was taken from Judge Smith's order and decree of June 18, 1964, and the peremptory writ of mandamus to the supreme court of Florida, which court, on July 1, 1964, approved and affirmed judge Smith's order and decree.

Section 1, Art. IX, State Const., provides that "the legislature shall provide for a uniform and equal rate of taxation . . . and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal . . ." (Emphasis supplied.) The legislature under its duty to prescribe these regulations for the assessment of property for ad valorem taxation passed certain laws for the assessment of such property on the basis of its "full cash value" or "true cash value." (See former §§193.06, 193.11, 193.13 and 193.22, F. S.). However, Ch. 63-250, Laws of Florida, now appearing as §193.021, F. S., superseded the former and substituted therefor the formula for the determination of "just valuation" as required by §1, Art. IX, State Const. The 1963 act became effective Jan. 1, 1964, and provided by its own terms that it would be applied and followed in the preparation of the 1964 and subsequent real property tax rolls. Section 193.021, F. S., sets out the several elements to be taken into consideration when determining "just valuation."

Although the supreme court of Florida in *Camp Phosphate Co. v. Allen*, 77 Fla. 341, 81 So. 503, held that the constitutional requirement for "just valuation" contained in §1, Art. IX, State Const., was not violated when all the taxable real property in a county was valued for ad valorem taxation on a basis of less than "full cash" or "true cash" value so long as the same percentage of full cash value was used throughout the county, this was before the adoption of Florida's homestead tax exemption provision found in §7, Art. X, State Const., adopted in 1934, and amended in 1938.

The question next arose after the adoption of the homestead tax exemption amendment in *Cosen Investment Co., Inc. v. Overstreet*, 154 Fla. 416, 17 So. 2d 788. In that case the court held that the rule adopted in *Camp Phosphate Co. v. Allen*, supra, was no longer fair and equitable because of the homestead tax exemption amendment, and that all real property must be assessed on the basis of its full cash value, or true cash value, else an inequality

would result as between the property of the homesteaders and non-homesteaders. This case was followed by the supreme court in *McNayr v. State of Florida ex rel. DuPont Plaza Center, Inc.*, supra; by the district court of appeal, second district, in *Sproul v. Royal Palm Yacht & Country Club, Fla. App.*, 143 So. 2d 900, and *Lanier v. Tyson, Fla. App.*, 147 So. 2d 365, texts 372 and 373.

In *Cosen Investment Co., Inc. v. Overstreet*, supra, and *DuPont Plaza Center, Inc. v. McNayr*, supra, it was the view of the supreme court of Florida that §1, Art. IX, and §7, Art. X, State Const., required that all taxable real estate in the state must be taxed on the basis of its "just value," which in substance is the same as its full cash value or true cash value. In *Green v. Walter, Fla.*, 161 So. 2d 830, at 833, after making reference to the equality and uniformity of taxation required by §1, Art. IX, State Const., in connection with intangible personal property taxes, said that "such uniformity could not be accomplished if the assessors operated individually by fixing varied percentages of full cash value." To the same effect see also *Franks v. Davis, Fla.*, 145 So. 2d 228, texts 230 and 231, relating to the assessment of stock in trade on a valuation differing from other tangible personal property, wherein the court remarked that "if the rates cannot be varied directly, however, neither can that result be achieved indirectly by manipulation of the assessment basis upon which levy is made."

Under §20, Art. III, State Const., "the legislature shall not pass special or local laws . . . for assessment and collection of taxes for state and county purposes."

It is provided in and by §11, Art. VIII, State Const., that Dade county may establish a county government as therein provided, and legislate on purely local matters and as otherwise provided in and by said section. Under said §11, Art. VIII, such local legislation may not conflict with the general statutes and laws of Florida. Constitutional and general statutory provisions relating to Dade and at least one other county of the state are declared by §11(9), Art. VIII, to be the supreme law in Dade county except as may be otherwise expressly provided by §11, Art. VIII.

In light of the above cited organic, statutory and case authorities, your questions are answered as follows:

AS TO QUESTION 1:

The legislature of Florida, in special session or otherwise, is without authority to enact legislation applicable to Dade county only, relieving its taxing authorities of their obligation to comply with the recent decree of the circuit court entered by judge Smith as affirmed by the supreme court. Any such enactment would contravene the provisions of §11, Art. VIII, and §20, Art. III, State Const.

AS TO QUESTION 2:

A legislative attempt to defer the assessment and collection of taxes in Dade county for a reasonable interval, would appear violative of the provisions of §20, Art. III, State Const., prohibiting special or local laws for the "assessment and collection of taxes for state and county purposes."

AS TO QUESTION 3:

This question appears to have been answered in the conclusions and discussion relative to questions 1 and 2 above.

It should be noted in passing that the court's ruling did not have the effect of voiding the statutes relating to the taxpayer's

right to equalization of the assessment of his property by the board of county commissioners sitting as the board of equalization.

064-117—August 17, 1964

REGULATION OF TRADE AND COMMERCE

HOUSING AUTHORITY—LICENSING REQUIREMENT PURSUANT TO CH. 527, F. S., LIQUEFIED PETROLEUM GAS DEALERS; INSTALLATION—CHS. 421, 527, §§421.04, 421.03, 421.08, 421.09, 527.01(2), (3), (6), 527.02, FORMER §§526.12—526.20, F. S.; §16, ART. XVI, STATE CONST.

To: *J. Edwin Larson, State Treasurer and State Fire Marshal, Tallahassee*

QUESTION:

Is a housing authority created pursuant to Ch. 421, F. S., subject to the provisions of Ch. 527, F. S., when the said housing authority is engaging in the business of a dealer in liquefied petroleum and gas installation as defined in said Ch. 527, F. S.?

Section 421.04, F. S., provides for the creation of a housing authority for certain cities and towns. The said housing authority, which is composed of 5 persons, is deemed to be a public corporation as defined in §421.03(1), F. S., and is to be operative only under those circumstances set forth in §421.04, F. S.

The powers of the housing authority are detailed in §421.08, F. S. It is presumed for the purpose of this inquiry that the said housing authority is authorized under the said provisions of §421.08, F. S., to engage as a dealer in liquefied petroleum gas and installation of the necessary apparatus in connection therewith.

Section 527.02, F. S., makes it unlawful for any person to engage in the business of dealer in liquefied petroleum gas or in the business of installation in this state without first obtaining from the fire marshal a license to engage in such business.

Sections 527.01(2), (3) and (6), F. S., contain the following pertinent definitions:

(2) Person—Every individual, firm, partnership, corporation, company, association, organization or co-operative.

(3) Dealer in liquefied petroleum gas—Any person selling or offering to sell any liquefied petroleum gas to the ultimate consumer for industrial, commercial or domestic use.

(6) Installation—The act of installing apparatus, piping and tubing, appliances and equipment necessary for storing and converting liquefied petroleum gas into flame for light, heat and power for use by the ultimate consumer.

The foregoing definition of the word "person" would appear to be sufficiently broad so as to include a public corporation such as a housing authority created by §421.04, F. S., *supra*. While §421.03(1), F. S., refers to the housing authority as a "public corporation," the supreme court of Florida has concluded that such housing authorities are, in effect, "real corporations." In *State v. St. John*, 197 So. 131, the court discussed the operation

of the housing authority of the city of Jacksonville, which authority was created pursuant to Ch. 421, F. S., supra, and stated at p. 134:

Thus there is created in substance and effect a real corporation, a separate and distinct corporate entity from that of the municipality, having power to contract with the municipality, and furthermore, a corporation which is not a municipality, its prime purposes being the construction and renting of dwellings or housing accommodations to tenants of a low income group for reasonable rental price, in competition with private citizens. Nor is the Housing Authority of Jacksonville a mere agency of the City of Jacksonville. If such were the case, then the city of Jacksonville might be liable for the large indebtedness created or to be created by the Housing Authority. But the Act under which it was created did not intend that the Housing Authority should be a mere agency of the City Government. A reading of the statute shows this. Not only is the Housing Authority Corporation vested with vast powers, including authority to issue debentures from time to time in its discretion for any of its corporate purposes, but Section 14 of the Act, Chapter 17981, expressly provides that the debentures and other obligations of the Authority shall not be a debt of the City, nor of the State nor any political subdivision thereof . . . (Emphasis supplied.)

Your attention is also directed to AGO 057-219, 1957-58, p. 259 holding that a municipal corporation is subject to the LP gas licensing provisions. In that opinion, referring to §§526.12-526.20 which provisions are presently embodied in Ch. 527, F. S., it was held in part as follows:

. . . When I consider the entire statute and the intent and the purpose of it, I do not think that the Legislature intended to exclude municipal corporations from the purview of said enactment when selling gases and installing equipment within the purview of the statute . . . (Emphasis supplied.)

I am not unmindful of the provisions of §423.01, F. S., relating to tax exemption of housing authorities which declare that, "the property and the debentures of the housing authority are of such character as may be exempt from taxation." However, the license fees provided for under §527.02, F. S., were held to be for enforcement purposes, *not* revenue-producing, and constituted an enactment under the police powers of the state (AGO 051-213, p. 322, Biennial Report 1951-52. See also AGO 057-272 and 058-111, pp. 328 and 619 1957-58). In addition, it is to be noted that under §421.09, F. S., relating to the operation of housing projects by the housing authority, the said authority is *authorized* to arrive at a rental figure that will produce revenue sufficient "to meet the costs of, and to provide for, maintaining and operating the projects (including the cost of any insurance) and the administrative expenses of the authority." (Emphasis supplied.)

Notwithstanding the characteristics of the licensing provisions of Ch. 527, F. S., the supreme court in the St. Johns case, supra, concluded that the statutory tax exemption in §423.01 would not exempt the housing authority of the city of Jacksonville from real property taxes unless the property was held and used for such purposes as set forth in §16, Art. XVI State Const.

Property of the 'Housing Authority' may be exempt from taxation only if and when it is shown to be held and used exclusively for municipal purposes, or for other purposes expressly stated in the constitution; and this should be clearly made to appear in allowing exemptions from taxation.

The court further pointed out with respect to the housing authority of the city of Jacksonville created pursuant to Ch. 421, F. S., as follows:

... But where, as here, the property is not owned by the City, the title and control of same being vested in the Housing Authority, a distinct entity, the authorities above cited required us to hold that the property here involved is not exempt from taxation under the quoted provisions of our constitution. The constitution expressly designates what property of corporations shall be exempt from taxation and of course the legislature is not empowered to add to or subtract from the clear and positive provisions of Section 16 of Article XVI of the Constitution

The provisions of Ch. 527, F. S., are a police measure enacted for protection and safety of the public from the unnecessary use of LP gas, from defective gas appliances and from improper installation of gasoline appliances and equipment. The statutes should receive a construction as will accomplish this purpose and make effective the protection of the public as was intended by such statute.

In light of the above statement it is my opinion that the housing authority is subject to the provisions of Ch. 527, F. S., when the said housing authority is engaging in the business of a dealer in liquefied petroleum gas and installation as defined in said chapter. Your question is, therefore, answered in the affirmative.

064-118—August 18, 1964

PUBLIC OFFICERS

MILEAGE—CONFLICT BETWEEN SPECIAL LAW AND GENERAL LAW—CH. 25289, 1949, §112.061, F. S., AS AMENDED BY CH. 63-400, §19, ART. V, STATE CONST.

To: *Ernest Ellison, State Auditor, Tallahassee*

QUESTION:

Do the provisions of Ch. 25289, 1949, or the provisions of §112.061, F. S., 1963, govern the mileage rate to be paid the county judge of Volusia county for his travel between the county seat and the auxiliary court chambers located outside the county seat?

Section 19, Art. V, State Const., provides that "judicial officers shall be paid such actual and necessary expenses as may be authorized by law." Sections 1 and 3 of Ch. 25289, 1949, provide as follows:

Section 1. That there shall be paid to . . . the County Judge of Volusia County, Florida, mileage at the rate of 7½ cents a mile as traveling expense for miles traveled by each such Judge in traveling for the purpose of holding Court or Chamber hearings at the County Seat of such County or at Cities or Towns in such County where Aux-

iliary Chambers or Court Rooms are established or maintained; provided that no such mileage shall be payable for any travel for which said Judge or Judges now be compensated under the provisions of general law.

Section 3. That such traveling expense of said County Judge of Volusia County, Florida, shall be paid out of the fees of the office of said County Judge as an expense of said office.

Section 1, Ch. 63-400, amends the provisions of §112.061, F. S., the same being the general law providing for traveling expenses of all public officers, employees and authorized persons.

Within the above 2 acts of the legislature lies the conflict upon which your question is directed. In 82 C.J.S. 477, §285, it is stated:

Ordinarily, a general repealing clause of inconsistent acts does not, when contained in a general act, operate to repeal a local or special act. This is especially true where the repealing clause mentions only general laws, or there is in fact no irreconcilable inconsistency between the general act and the special act in question. However, a general repealing clause of inconsistent acts may operate to repeal an inconsistent special or local act where such repeal appears to be intended by the legislature, as where the repealing clause expressly mentions special and local acts.

Section 112.061(1)(b) 2., F. S., provides that, "the provisions of any special or local law, present or future, shall prevail over any conflicting provisions in this section, but only to the extent of the conflict." It is clear from the above that the mileage rate for travel expenses, while the county judge of Volusia county is traveling on official business between the county seat and the auxiliary court chambers located outside the county seat, will be governed by the provisions of Ch. 25289, 1949.

This opinion is written with the knowledge of the existence of AGO 064-21, to the Hon. Ray E. Green, state comptroller, and is in no way in conflict with said opinion.

Your question is answered accordingly.

064-119—September 1, 1964

COUNTY OFFICERS AND EMPLOYEES

CIVIL AIR PATROL—LEAVE OF ABSENCE FOR COUNTY EMPLOYEES—§§115.07, 115.08; CH. 115, F. S.

To: *Harry A. Johnston, County Attorney, Palm Beach County, West Palm Beach*

QUESTION:

Is a member of the civil air patrol entitled to leave of absence from county employment with pay while engaged in emergency duty with the civil air patrol?

Your board of county commissioners, you state, notes that the civil air patrol is a volunteer semicivic organization; that it renders a semipublic service and that its members frequently are called out to search for lost airplanes. While doing so, such members may be absent from their county duties and the county commission wishes to know if, under such circumstances, it may legally pay their salaries during such absences.

The civil air patrol is a patriotic organization and was chartered as such by the U. S. congress (36 U. S. code, 201-208). It was chartered July 1, 1946, and is sponsored by the U. S. air force to develop sources of aerospace leaders. Membership of the cadets is limited to boys and girls between the ages of 13 and 18. Adult members direct their training and conduct the actual flying of search missions.

By federal law the civil air patrol legally occupies the same status as the reserve officers association, future farmers of America, national safety council, American national red cross, boy scouts of America, girl scouts of America, the U. S. olympic association and other similar organizations. The civil air patrol is not a part of the U. S. air force nor of any other official military or naval force of the U. S.

Leaves of absence with pay are granted to any state, county or municipal officer or employee by authority of §115.07, F. S., as follows:

All officers or employees of this state, or of the several counties or municipalities of this state, who are commissioned reserve officers or reserve enlisted personnel in the United States military or naval service or members of the national guard, shall be entitled to leave of absence from their respective duties, without loss of pay, time or efficiency rating, on all days during which they shall be engaged in field or coast defense exercise or other training ordered under the provisions of the United States military or naval training regulations for such personnel when assigned to active duty; provided that leaves of absence granted as a matter of legal right under the provisions of this section shall not exceed seventeen days in any one annual period; provided, further, that leaves of absence for additional or longer periods of time without pay for assignment to duty with civilian conservation corps units or other functions of a military character may be granted in the discretion of employing or appointing authority of any state, county or municipal employee and when so granted shall have the force and effect of other leaves of absence authorized by this section.

"Active military duty" is defined in §115.08, F. S., as active duty in the Florida defense force or federal service in training or on active duty with any branch of the army of the U. S., the U. S. navy, the marine corps of the U. S., coast guard and public health service. The civil air patrol, while it is sponsored and guided by the U. S. air force, is not a part of the military establishment.

Expenditures of county funds must be made in strict compliance with statutes. I find no authority in Ch. 115, F. S., nor elsewhere for the granting of paid leaves of absence to county employees for service with the civil air patrol.

Your question is answered in the negative.

064-120—September 1, 1964

COMPETITIVE BIDDING

COUNTY COMMISSION—ANNUAL CONTRACT FOR ROAD SURFACING ON SQUARE YARD BASIS—\$125.08, F. S.

To: C. E. Duncan, County Attorney, Lake County, Tavares

QUESTION:

May Lake county call for and accept an annual bid from road contractors for the leveling and surfacing or resurfacing of existing county roads on a per square yard basis, without use of additional materials?

Section 125.08, F. S., provides that "No contract shall be let by the board of county commissioners for the working of any road or street . . ." without public advertising and bids for such work on a competitive basis, for, among other things, "work to be done." In the case of Lake county, you advise that bids are required where a contract will exceed \$1,000.

Statutes requiring competitive bidding are to be construed strictly, and are not to be extended beyond their clear implication. However, they should receive a construction which effectuates their true intent and avoids circumvention. (20 C.J.S. 1020, §183.)

Clearly the word "work" when used in connection with roads means to surface or resurface, using existing clay or other materials present on the road. This may be done either by men and equipment of the county, or under contract by private concerns equipped to "work" roads.

The word "any" when used in the statute seems to mean "one," although Webster's new international dictionary defines "any" as meaning one or more. However, the more obvious meaning intended by the legislature is the singular one. If this be the case, a contract for working all the county roads would have to include each road for a predetermined portion of the total contract, and this obviously would defeat the purpose of the commission.

Although there is legal authority for following it, the procedure you have suggested is a radical departure from accepted county practice due to the indefinite nature of the proposed work. It is possible that the county would not want *any* resurfacing or reworking of its roads during the life of the contract. It is also possible that the county would require more of such work than the contractor could do, in the event of weather conditions or the effect of a hurricane which would require an extraordinary amount of road reconstruction.

All of these factors make such a contract a highly speculative one in which the seeds of legal discord are plainly visible. I need not remind you that the contractor would have to give proper bond under §255.05, F. S., a bond which must anticipate the maximum work contemplated.

In the light of the above observations, your question is answered in the negative.

064-121—September 1, 1964

COMBINATIONS RESTRICTING COMMERCE

APPLICABILITY OF §542.12, F. S., RELATIVE TO CONTRACTS IN RESTRAINT OF TRADE TO MEDICAL DOCTORS

To: *Homer L. Pearson, M. D., Director, Florida State Board of
Medical Examiners, Miami*

QUESTION:

Does §542.12 prevent medical doctors from executing enforceable contracts not to compete in the practice of medicine when practicing individually or as a member of partnership?

Section 542.12, F. S., provides:

(1) Every contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind, otherwise than is provided by subsections, (2) and (3) hereof, is to that extent void.

(2) One who sells the good will of a business, or any shareholder of a corporation selling or otherwise disposing of all of his shares in said corporation, may agree with the buyer, and one who is employed as an agent or employee may agree with his employer, to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a reasonably limited time and area, so long as the buyer or any person deriving title to the good will from him, and so long as such employer continues to carry on a like business therein. Said agreements may, in the discretion of a court of competent jurisdiction be enforced by injunction.

(3) Partners may, upon or in anticipation of a dissolution of the partnership, agree that all or some of them will not carry on a similar business within a reasonably limited time and area.

(4) This section does not apply to any litigation which may be pending, or to any cause of action which may have accrued, prior to May 27, 1953.

In *Standard Newspapers, Inc. v. Woods, Fla., 1959, 110 So. 2d 397*, the Florida supreme court upheld the constitutionality of the statute. In that case justice Thomas speaking for the Florida supreme court traced the history of the law regarding contracts in restraint of trade. At p. 399 he wrote:

Originally, under the common law of England, contracts restraining a man's right to follow his calling were considered void as against public policy. This view developed from the requirement that a man could not pursue a trade to which he had not become apprenticed, and that one so committed was subject to penalty if he did not exercise that trade. Consequently an agreement to restrain him from following his trade would result either in his violation of the law or the deprivation of his right to earn a livelihood.

Prior to the enactment of §542.12, F. S., *supra*, the policy of the Florida courts was stated in *Love v. Miami Laundry Co., 118 Fla. 137, 160 So. 32, 33*:

The question for us to determine is whether or not a court of equity will grant injunctive relief against a breach

of contract of this character. That the contract was made and executed for valuable consideration cannot be doubted; but the mere existence of a contract does not mean that in all cases the writ of injunction may be invoked to stop or prevent its breach.

* * *

That courts are reluctant to uphold contracts whereby an individual restricts his right to earn a living at his chosen calling is well established.

Following argument upon petition for rehearing, justice Buford further rested the court's opinion upon the want of mutuality of remedy available between the parties to the contract, stating at p. 34:

A court of equity should not lend its power to enforce the provisions of an executory contract against one of the parties unless the terms and conditions of the contract are such that the court of equity might enforce at least a part of the terms thereof against the other party.

After the enactment of §542.12, F. S., a case involving the interpretation thereof reached the district court of appeal, 1st district, in *Atlas Travel Service v. Morelly*, Fla. App., 1957, 98 So. 2d 816. At p. 818 of the opinion judge Sturgis wrote:

The courts are not concerned with the wisdom of statutory law, and one that expressly or by implication supersedes the common law and which does not do violence to organic provisions or principles becomes the controlling law within its proper sphere of operation. *Banfield v. Addington*, 104 Fla. 661, 140 So. 893; *Broward v. Broward*, 96 Fla. 131, 117 So. 691.

Section 542.12, F.S.A. clearly supersedes the common law rule enunciated in *Love v. Miami Laundry Co.*, supra (118 Fla. 137, 160 So. 35). The permissive language of the statute, whereby agreements of the character in suit *may* in the *discretion* of the court, be enforced by injunction, does not imply that the court is vested with an absolute or arbitrary discretion, and is construed as requiring that the discretion shall be reasonably exercised to the end that the object of the statute may not be nullified. The relief cannot be withheld when the proofs, as in the case on appeal, reveal no other alternative. *Weston v. Jones*, 41 Fla. 188, 25 So. 888; *Mitchell v. Duncan*, 7 Fla. 13, 14. The provisions of the instant contract relating to time and area are found to be reasonable, and well within the directive of the statute, and it is not otherwise harsh, oppressive or unjust. (Emphasis supplied.)

In view of the chancellor's reliance on *Love v. Miami Laundry Co.*, supra, it is apparent that he applied an erroneous rule of law to the facts in this case, and it is incumbent on this court to reverse the decree.

In *Davis v. Ebsco Industries, Inc.*, Fla. App., 1963, 155 So. 460, 461, the district court of appeal, 3rd district, through judge Hendry stated that the public policy regarding contracts not to compete was declared by §542.12, F. S.

Medical doctors licensed by the Florida state board of medical examiners pursuant to the provisions of the medical practice act, Ch. 458, F. S., are persons "exercising a lawful profession" within the ban of §542.12(1), F. S.; and any contracts entered into by and between medical doctors agreeing not to compete are to that

extent void. Thus, medical doctors are wholly precluded from making valid agreements not to compete unless such agreements fall within the exceptions or proviso contained in §542.12(3), F. S. Section 542.12(3), *supra*, permits certain contracts not to compete as it relates to certain business partners. Standing alone the word business ordinarily describes any employment, occupation or profession engaged in for gain or livelihood. Black's law dictionary, p. 248. Under the doctrine of *eiusdem generis*, the word "business" as employed in §542.12(1), F. S., partakes of the same general nature as the words "profession" or "trade" which precede it in the same sentence. By employing the word "business" in §542.12, F. S., without further limitation as to the nature thereof, the legislature imported the same meaning as it did in §542.12(1), F. S.

A review of the legislative history of §542.12, F. S., reveals that it was enacted as Ch. 28048, 1953, which was introduced as a committee substitute for Senate Bill No. 40. The title to this bill provides help in gleaning the legislative intent. Therein it provides:

AN ACT invalidating contracts in restraint of trade;
authorizing enforcement of certain agreements not to compete for limited time within limited area.

A title to a legislative act is a part of the statute and may be resorted to in construing the same where ambiguity exists. *Jackson Lumber Co. v. Walton County*, 95 Fla. 632, 116 So. 771. At the time of the passage of the act the only contracts of this nature which were enforceable were those which contained "some special equity." *Arond v. Grossman*, Fla. 75 So. 2d 593, 595. Therefore, while this act codified the common law rule generally it nevertheless authorized the enforcement of certain contracts not to compete which were theretofore unenforceable.

In summary, therefore, it is my opinion that §542.12, F. S., generally prevents medical doctors from executing enforceable contracts not to compete in the practice of medicine, except when they are so engaged in a professional partnership and then only upon or in anticipation of a dissolution of the partnership and then only within a reasonably limited time and area. The statute permits the parties to anticipate possible dissolution of the partnership at the time the partnership agreement is executed.

064-122—September 2, 1964

MECHANICS LIEN LAW

NOTICE TO OWNER NOT REQUIRED BY STATE OR OTHER GOVERNMENTAL ENTITY—§§84.011(14), 84.061, 255.05, F. S.

To: *Forrest M. Kelley, Jr., Architect, Board of Control, Tallahassee*
QUESTION:

Under Ch. 84, F. S., mechanics lien law, must the state require subcontractors supplying materials or labor to file a notice to owner as set out in §84.061, F. S. when the real property and improvements thereto are state owned?

The notice to owner set out in §84.061, F. S., which you have referred to in your letter, operates to give the subcontractor certain lien rights against the real property of the owner in the event that the general contractor defaults on his contract with the sub-

contractor. These rights accrue notwithstanding the fact that no privity of contract between the owner and subcontractor exists.

This notice to owner is not a prerequisite to an action against the general contractor by the subcontractor, as stated in your letter, since privity of contract generally exists between these parties, but it is a prerequisite to an action for a lien against the real property of the owner in the event of default by the general contractor.

Section 84.011(14), F. S., which defines real property specifically exempts land owned by the state, county, any municipality, school board or governmental agency, commission or political subdivision. Because of this exception, a materialman or subcontractor could not obtain a lien against real property where the state or any of the other political subdivisions enumerated in §84.011(14) is the owner.

Specific reference is also made to the case of city of St. Augustine v. Brooks, 55 So. 2d 96, (1951), wherein the Florida supreme court, in effect, held that state owned lands are not subject to a mechanics lien for services or materials furnished for improving such lands. In the way of supplementary information it should be pointed out that §255.05, F. S., provides subcontractors and materialmen who furnish services on state construction projects with protection against a defaulting general contractor. This section requires the general contractor on all state construction projects to furnish a performance bond and sets out a procedure whereby the subcontractor and materialman can go against that bond in the event of a default by the general contractor.

On the basis of the Florida case and laws above referred to, the question set out herein is answered in the negative.

064-123—September 2, 1964

TAXATION

OCCUPATIONAL LICENSE TAXES—REAL ESTATE BROKER §§205.52, 475.14, CH. 205, F. S.

To: James R. Adams, County Attorney, Naples

QUESTION:

Is a natural person who holds an active real estate broker's license, as compared to a nonactive license as defined by §475.14, F. S., but who does not have an office for engaging in the real estate business, has not sold, leased or let real estate, the title to which was not in him when it was offered for sale, lease or rental, does not advertise real estate for sale, lease or rental, and does not maintain an office bearing signs that real estate is for sale, lease or rental, required to pay the license tax of \$10 which is set out in §205.52, F. S.?

Chapter 205, F. S., is a revenue producing law and imposes certain license taxes for the privilege of engaging in certain occupations, professions or trades in the state of Florida. These taxes are in addition to any fees which may be provided for in the regulatory section of the law dealing with the occupation, profession or trade.

With specific reference to §205.52, F. S., the key words therein are "engaged" and "practicing." By the use of those words the

legislature has evidenced an intent to impose a license tax on persons *engaged* in the *practice* of a profession. "A license is merely a privilege to do business, and is often required as a condition precedent to the right to carry on business . . ." 21 Fla. Jur. 10, Licenses and License Taxes, §2. In the question you have posed, the person involved is not *engaging* in the practice of a profession or carrying on a business, therefore, he should not be required to pay a tax for a privilege he is not using.

Notwithstanding the fact that a person holds an active real estate broker's license which allows him to engage in the real estate profession in this state, the license tax provided for in §205.52, F. S., should not be imposed until the person actually engages in the profession.

On the basis of the above, it is my opinion that your question is answered in the negative.

064-124—September 2, 1964

TAXATION

METHOD OF FIXING MILLAGE—CONSTRUCTION OF §193.03(1) (a), (b), (2), (3), F. S., AS AMENDED BY CH. 63-250, LAWS OF FLORIDA

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are the requirements for the giving of public notice contained in §193.03(1), (3), F. S., as amended by §8, Ch. 63-250, applicable when there has been no increase in the valuation of taxable properties?

It is clear that the requirement in §193.03(1), that taxing boards, boards, commissions, officers and other agencies for which taxes are imposed upon the taxing rolls of Sumter county, upon the increase of the ratio of taxable value to full cash value of taxable properties of the county, shall reduce tax millages in proportion to the increase of taxable values to full or true cash value of the properties of the county. The proviso in said §193.03(1), provides that "if in preparing its proposed budget for 1963-1964 and 1964-1965, such budget making authority determines that the millage required for operating funds should be increased no more than ten per cent more" it shall proceed as required in paragraphs (a) and (b) of said §193.03(1). Section 193.03(3) provides that "in the event any budget making authority shall determine that due to impending emergencies said authority will require funds in excess of those anticipated, and that unless additional funds are made available for the operation of said authority in meeting its legal duties and obligations will be seriously impaired and provided that such budget making authority has requested and obtained a ten per cent increase as set forth in subsections (1) and (2) herein, the said budget making authority may apply for an additional increase in the millage required to meet the budget for operating funds in the" manner set out in said §193.03(3).

A careful reading of said §193.03, F. S., fails to reveal any express provision in said section, making the above-mentioned provisions for the increase of millages, and the procedures thereunder, dependent upon an increase of the ratio of valuations for tax pur-

poses to the full or true cash value of the properties to be taxed. This seems to find some support in the language of the title, as to said §193.03 which is "amending Section 193.03, Florida Statutes, providing for reduction of millages when assessed valuation is increased; providing a procedure to increase millage." There appears from said §193.03, F. S., as amended by §8, Ch. 63-250, an ambiguity as to the clear intent and purpose of the legislature when it enacted said §8 of Ch. 63-250. We have discussed the question with members and employees of the legislative reference bureau and others connected with the 1963 legislature, and considered the history of said Ch. 63-250, as well as prior statutes and laws of 1941 and 1943 similar in nature and purpose to said Ch. 63-250, from which it appears that it was the intention of the said 1963 legislature that said §8 of said Ch. 63-250, which amended §193.03, F. S., relates in its entirety to those cases where there has been a general increase in the ratio of assessed value of the taxable real and tangible personal property of the county, and not to those cases where there has been no such increase of valuation.

In the light of the above and foregoing the above-stated question is answered in the negative, and our said Opinion 064-113, of August 3, 1964, is hereby withdrawn and this opinion substituted in lieu thereof.

064-125—September 1, 1964

STATE OFFICERS AND EMPLOYEES

MILITARY LEAVE PAY—FLORIDA COUNCIL FOR THE BLIND—§§115.09, 115.14, F. S.

To: *Murdock Martin, Executive Director, Florida Council for the Blind*

QUESTION:

Is an employee of the Florida council for the blind, a state agency, who is recalled to active military duty, entitled to a leave of absence with compensation for the first 30 days of absence?

Section 115.14, F. S. provides as follows:

All employees of the state, and of the several counties of the state, and of the municipalities or political subdivisions of the state, may, in the discretion of the employing authority of such employee, be granted leave of absence under the terms of this law, and upon such leave of absence being granted, said employee shall enjoy the same rights and privileges as are hereby granted to officials under this law, insofar as may be.

Section 115.09, F. S. provides that public officials who have been granted military leave pursuant to law shall receive full pay for the first 30 days of such leave of absence.

It is therefore my opinion that should an employee of the Florida council for the blind be recalled to active military duty, whether or not said employee is to receive military leave of absence is within the discretion of the Florida council for the blind and that if leave of absence is granted the first 30 days shall be with pay.

064-126—September 3, 1964

ELECTORS AND ELECTIONS**ASSISTANCE FOR ILLITERATES CASTING BALLOTS NOT AUTHORIZED—§§101.071, 101.51, 101.051, 101.061, F. S.***To: Tom Adams, Secretary of State, Tallahassee***QUESTION:****Are illiterates entitled to assistance at the polls when voting?**

While there was formerly a provision in the law authorizing assistance to illiterates similar to that given to physically handicapped, the law was in 1959 amended by the legislature so as to make it easier for the physically handicapped to cast a ballot and at the same time deleting those provisions which previously authorized assistance to illiterates. The effects of the amendment were discussed in AGO 059-180, p. 269 of the 1959-60 biennial report of the attorney general.

While Florida has no literacy requirements and a person cannot be denied the right to register on the basis of illiteracy alone (See AGO 048-49, p. 52 of the 1947-48 biennial report of the attorney general), there is presently no provision in the law which entitles illiterates to receive assistance at the time of voting. In fact, §§101.071 and 101.51, F. S., require that each elector must occupy the voting booth alone except in those cases where assistance is allowed for the physically handicapped under the provisions of §§101.051 and 101.061, F. S. Under these provisions it would appear that it would be unlawful to allow any one to enter the voting booth or voting machine for the purpose of assisting a person solely on the grounds of illiteracy.

In view of the above-cited authorities it would appear that your question as set out above should be answered in the negative.

064-127—September 10, 1964

STATE AND COUNTY OFFICERS AND EMPLOYEES**RETIREMENT SYSTEM—CAMPBELLTON-GRACEVILLE HOSPITAL—CH. 61-2290, LAWS OF FLORIDA; CH. 122, §§122.02, 122.061, F. S.***To: Ray E. Green, State Comptroller, Tallahassee***QUESTION:****Are the officers and employees of a hospital district or county hospital corporation, such as the Campbellton-Graceville hospital district, established under and pursuant to Ch. 61-2290, within the purview of Ch. 122, F. S.?**

Said Ch. 61-2290 provides in part that "the area embraced within the boundaries or limits of County Commissioners District No. 1 and Precinct No. 32, in effect on January 1, 1961, is hereby declared to be and is established a public hospital district to be known as Campbellton-Graceville Hospital District for the purpose of building, maintaining and operating a public hospital at Graceville, Jackson County, Florida . . . there is hereby created a public non-profit corporation, which is hereby designated as Campbellton-Graceville Hospital Corporation . . . The Board of County Commis-

sioners of Jackson County, Florida and/or their successors, are hereby charged with the duty of providing revenue from the source and in the manner hereafter provided for the erection, building, equipping and maintenance and operation of the aforesaid Campbellton-Graceville Hospital, from year to year . . . Provided, however, that not more than 5 mills on the dollar of ad valorem taxes shall be levied in any given year for the purposes aforesaid, or for any of such purposes . . ." These taxes when assessed and collected are paid over to the hospital corporation to be used for the purposes aforesaid. It is further provided, in and by Ch. 61-2290 that the "purposes of such hospital are hereby declared to be public purposes and the county purposes of the County of Jackson."

State and county officers and employees, within the purview and intent of Ch. 122, F. S., "include all full time officers and employees who receive compensation for services rendered from state or county funds . . . whether the same is paid by state or county warrant or not; provided that such compensation in whatever form paid shall be specified in terms of monthly salaries by the employing state or county agency or state or county official . . ." (§122.02, F. S.). It is provided in and by §122.061, F. S., that "boards of hospital districts and county hospital corporations may elect to bring employees of such districts or corporations under the provisions of the retirement law. Once this election is made it may not be revoked and all present and future employees shall be compulsory members of the state and county officers and employees retirement system . . ."

It is clear from a reading and construction of Ch. 61-2290, and Ch. 122, F. S., that the Campbellton-Graceville hospital district and its hospital employees are within the intent and purview of said §122.061, F. S., and although not compulsory members of the said retirement system, may elect to become members of such system upon compliance with said §122.061, F. S.

064-128—September 10, 1964

TAXATION

HOMESTEAD TAX EXEMPTION—CONSTRUCTION OF PHRASE "ANY ONE DWELLING HOUSE" AS USED IN §§1, 7, ART. X, STATE CONST.

To: *Charles L. Crumpton, Assistant Director, Metropolitan Dade County Planning Department, Miami*

QUESTION:

What is the intention and meaning of the phrase, "any one dwelling house," as used in §7, Art. X, State Const., which relates to homestead tax exemption?

Said §7, Art. X, State Const., after providing for the homestead tax exemptions provided for in said section, further provides that "no such exemption of more than five thousand dollars shall be allowed to any one person or on any one dwelling house, nor shall the amount of the exemption allowed any person exceed the proportionate assessed valuation based on the interest owned by such person." (Emphasis supplied.) Section 1, Art. X, State Const., contains the provision that the homestead exemption provided for thereunder when within a city or town "shall not extend to more

improvements or buildings than the residence and business house of the owner.

In *Overstreet v. Tubin*, Fla., 53 So.2d, 913, text 915, the court stated that "we think, then, that the only reasonable interpretation of the words 'dwelling house,' as used in §7 of Article X, is that the whole structure of a multiple dwelling house, rather than each separate unit thereof, is meant, and it follows, therefore, that each owner of a separate unit is entitled to claim only his proportionate part of the \$5,000 tax exemption, based on his proportionate part of the assessed valuation of the entire structure." In this case a duplex residence building was held but a single dwelling house, with each apartment owner being entitled to homestead tax exemption of not exceeding \$2,500.

In *Gautier, Tax Assessor v. State ex rel Safra*, Fla., App., 127 So.2d 683, a four dwelling unit residence building was held to be but a single dwelling house, with each apartment owner being entitled to homestead tax exemption of not exceeding \$1,250.

In *Smith v. Guckenheimer*, 42 Fla. 1, 27 So. 900, text 915, the court said that under §1, Art. X, State Const., that "only that portion of a building actually occupied as a residence or business house is exempt." In this case there was involved a combination business house and dwelling of the owner consisting of storerooms on the first floor and rooms suitable for dwelling purposes on the second floor, with the owner occupying certain of the storerooms for the business operated by him, and certain of the rooms on the second floor as his residence for himself and his family, renting other of such second story rooms. The court divided the store and residence rooms occupied by the owner from those rented to others, holding the ones occupied by the owner to be his homestead property and the rooms rented by him to be nonhomestead property and subject to sale under execution. The same rule doubtless extends to homestead tax exemption under §7 Art. X, State Const.

Apartment buildings containing more than 1 residence apartment and accommodating more than 1 family, have been held to be *dwelling houses* in *Pierce v. Kelmer*, 304 Pa. 509, 156 Atl. 61, 62; *DeLaney v. Van Ness*, 193 N.C. 721, 138 S.E. 28, text 29; *Douglass v. Queeney*, 109 Pa. Super. 336, 167 Atl. 453, text 456; *Mason v. People*, 26 N.Y. 200, text 202; *Smith v. Birmingham Waterworks Co.*, 104 Ala. 315, 16 So. 123, text 125; *Reformed Protestant Dutch Church v. Madison Ave. Building Co.*, 214 N.Y. 268, 108 N.E. 444, text 445; *Satterthwait v. Gibbs*, 288 Pa. 428, 135, Atl. 862, text 863; *State v. Harvey*, Fla., 68 So.2d 817, text 818; *Jernigan v. Capps*, 187 Va. 73, 45 S.E. 2d 886, text 889 and 890; *Sporn v. Overholt*, 175 Kan. 197, 262 P.2d 828, text 831; *Fox v. Sumerson*, 338 Pa. 545, 13 A.2d 1, text 2.

Doubtless the phrase "any dwelling house" as used in said §7, Art. X, State Const., and as above-discussed, refers to the *building* in which a person or persons make their home and have their permanent residence, and includes buildings and structures housing one or more persons or families, and includes buildings wherein are located one or more residence apartments. An apartment building housing numerous residence apartments is but a single "dwelling house" within the purview of said §7, Art. X, State Const. The reference in said §7 to "any dwelling house" is a reference to the building housing dwelling units or apartments and that without regard to the number of dwelling units or apartments. For a building to constitute a "dwelling house" it must be a com-

plete structure within itself used for residential purposes, and this is without regard to the number of residential apartments and facilities. A separate building with accommodations for but a single family would be "a dwelling house," and a building with accommodations for two or more families would also be a "dwelling house," each entitled to but \$5,000 in exemptions from taxation under §7, Art. X, State Const., and this without regard to the number of apartments or family accommodations.

In other words, the \$5,000 in tax exemption authorized under §7, Art. X, State Const., applies to the "dwelling house" as above-defined, not to the several apartments or living quarters available therein. With the structures mentioned in your request for opinion, the primary question for determination is whether or not the facts and circumstances involved, taken together, go to make up a single "dwelling house," which may consist of one or more apartments or distinct and separate dwelling houses accommodating but a single person and his or her family. Whether or not facing placed over spaces between walls to improve visual attractiveness of the buildings or the development, including the use of expansion joints to seal out the weather or for other purposes, may have the effect of creating a single building, or two or more buildings, must be determined from the ultimate result obtained therefrom, as a question of fact to be determined in the first instance by the Assessor of taxes.

The ultimate question appears to be whether or not the completed facility or structure constitutes but a single "dwelling house" or a group of "dwelling houses," within the purview of §7, Art. X, State Const., as construed by the Florida courts aforesaid, which question must be determined in each individual case from all the applicable facts and circumstances. Whether or not the skill of an architect who may successfully design residential units so that each such unit will constitute but a single and distinct "dwelling house," yet on the other hand appear to be but a single structure, seems to be the key to amount of tax exemptions available under §7, Art. X, State Const., to the apartment owners residing in the living units of a residential facility. This must be determined from the applicable facts and circumstances in each individual case.

The above observations answer the question as well as the same may be answered generally.

064-129—September 10, 1964

COUNTY FINANCES

COUNTY BUDGETS—BUDGET-MAKING AUTHORITY—SPECIAL DISTRICTS AND OFFICERS—§§30.49, 129.01(1), 145.061, 155.12, 193.03, 193.03(6), 237.09-237.24, 388.201, 388.221; CHS. 129, 155, 388, F. S.

To: *Thomas J. Shave, Jr., County Attorney, Nassau County, Fernandina Beach*

QUESTIONS:

1. What is the meaning of "budget-making authority" as used in §193.03, F. S.?
2. Which of the following could be classed as a "budget-making authority": Humphreys Memorial Hos-

pital, Amelia Island mosquito control district, the county judge of Nassau county and the sheriff of Nassau County?

3. Is the limitation on increase of millage as set out in §193.03(6), F. S., to continue in effect through 1972-1973 or only during the years 1963-1964 and 1964-1965?

The purpose and policy of budget-making is discussed by the supreme court of Florida in the following from Consolidated Naval Stores Co., v. Hendry, Fla., 30 So.2d 617:

The purpose and policy of budgeting is to inoculate the administration of national, state and local government with some degree of system and business order; to put an end to blind spending; to get away from anything that savors of a spendthrift policy, and reduce income and outgo to a common level. . . ."

As noted in the above opinion, authority to make up the county budget is lodged principally with the board of county commissioners and the board of public instruction. The budget-making powers of the boards of county commissioners are set out in Ch. 129, F. S.; that of the board of public instruction is found in §§237.09-237.24, F. S., inclusive.

In §193.03, F. S., as to the method of fixing the tax millage, the legislature referred to budget-making authority as follows:

(1) After the assessment rolls have been prepared on the basis required by law, the board of county commissioners and the board of public instruction and all other governing boards or governing authorities of all other taxing districts, within the counties including municipalities, whose taxes are assessed on the tax roll prepared by the county assessor, shall for the fiscal years 1963-1964 through 1972-1973, inclusive, reduce the millage to be levied by each such governing authority from what it was in the preceding year proportionate to the increase of the general level of assessed value over the preceding year. Provided, however, if in preparing its proposed budget for 1963-1964 and 1964-1965, such budget-making authority determines that the millage required for operating funds should be increased no more than ten per cent more than the millage determined in subsection (6) of this section it shall proceed as follows: . . .

Thus, a budget-making authority is designated as the board of county commissioners (for all those items of control of the levy of taxes and the expenditure of money for all *county purposes* as set out in §129.01(1), F. S.; the board of public instruction, as noted above; and, finally, all other *governing* boards or *governing* authorities of all other taxing districts within the counties, including municipalities.

The budget-making authorities are required in §193.03, F. S., to submit proposed budgets to the state comptroller for approval of any increase over 10%.

The Humphreys memorial hospital is the successor to the Nassau general hospital. If it was organized under Ch. 155, F. S., then the board of trustees of the hospital is authorized to prepare a statement of receipts and disbursements for the preceding fiscal or calendar year, according to which way its books are kept, and file such statement with the board of county commissioners, and shall certify to the county commissioners the amount necessary for maintenance and improvement of the hospital facil-

ity during the ensuing year. The county commission shall thereupon levy a tax of not to exceed 10 mills to provide for the expenses and improvements of the hospital (§155.12, F. S.). I do not understand that this makes the hospital a budget-making authority. The county commission must complete the preparation of the hospital budget by determining the amount of taxes which will meet the expenses and balance out the other revenue of the hospital.

The Amelia Island mosquito control district is established, I assume, under Ch. 388, F. S., and is administered by a separate board of commissioners. This board is authorized by §388.201, F. S., to prepare its budget, and by §388.221, F. S., to levy taxes not to exceed 10 mills for maintenance of the district. This tax levy is certified to the board of county commissioners, which orders the assessment and collection of the tax. Thus, the Mosquito control district would be a budget-making authority.

The difference between the Hospital district and the Mosquito control district is that the county commissioners determine on the basis of an annual statement of receipts and disbursements and of anticipated needs what the budget for the hospital shall be, while the mosquito control board of commissioners makes that determination independently of the board of county commissioners.

The budget for the office of sheriff is prepared by the sheriff, submitted by him to the board of county commissioners, which in turn may require such changes or modifications to be made as seem necessary, subject always to a final review, if required, by a state board consisting of the governor, comptroller and attorney general (§30.49, F. S.). Thus, the sheriff would not be a budget-making authority.

If the county judge is receiving an annual salary under §145.061, F. S., his budget is subject to review by the board of county commissioners. The county judge therefore is not a budget-making authority.

The limitation on millage set out in §193.03, F. S., will remain in effect through 1972-1973, unless revised by subsequent legislatures. The ratio rule set out in §193.03(6), of this section applies, of course, only when there has been a general increase in the level of assessed property values. This level will be affected each year by the amounts added as new assessments or those eliminated from the rolls, in addition to any general increase or decrease in the general level of valuation.

AS TO QUESTION 1:

A budget-making authority is one which has the authority to establish a tax levy as well as the authority to establish the necessity for such tax levy, the two going hand in hand. Consolidated Naval Stores Co. v. Hendry, supra.

AS TO QUESTION 2:

The Amelia Island mosquito control district would be a budget-making authority in that it can establish required expenditures and the tax rate to meet such expenditures. The others do not have such authority.

AS TO QUESTION 3:

The limitation on increase of millage will continue without amendment of §193.03, F. S., through 1972-1973, but any legislature meeting subsequent to 1964 may amend this.

064-130—September 10, 1964

REGULATION OF VOCATIONS AND PROFESSIONS

BARBERING—CH. 476, F. S., GRANDFATHER CLAUSE—
CHS. 14650, 1931; 19183, 1939, LAWS OF FLORIDA;
§16.20, 1941, F. S.

To: *James E. Burnette, Director, Florida Barbers' Sanitary Commission, Tallahassee*

QUESTION:

Does Ch. 476, F. S., regulating the practice of barbering contain a "grandfather" provision that would permit a person to be licensed without an examination?

The purpose of a "grandfather" clause is to exempt from the statutory regulations imposed for the first time on a trade or profession those members thereof who are then engaged in the newly regulated field on the theory that they, who have acceptably followed such profession or trade for a period of years or who are engaged therein on a certain date, may be presumed to have the qualifications, and subsequent entrance to the field must be demonstrated by examination. (See 4 ALR 2d p. 670.)

An examination of the provisions of Ch. 476, F. S., relating to the practice of barbering in the state fails to indicate the existence of any "grandfather" provision.

Chapter 476, F. S., was derived from Ch. 14650, 1931. Section 12 of that act contained a "grandfather" provision providing in part as follows:

Any person, resident of this State who has for two years immediately preceding the passage of this Act continuously engaged in the practice of barbering at one or more established places of business shall be granted a certificate of registration as a registered barber *without examination* by making application to the Board on or before January 1st, A. D. 1932, and paying the required fee. (Emphasis supplied.)

However, in 1939, the legislature enacted Ch. 19183, which specifically repealed the said chapter 14650, as follows:

Section 27. Repealed.—Chapter 14650, Laws of Florida, Acts of 1931, and all laws and parts of laws in conflict herewith are hereby repealed; . . .

In addition, §12 of Ch. 19183, contained what might be referred to as a "grandfather provision" which provided in part as follows:

Any person who has been granted a certificate of registration as a barber, or a permit as an apprentice barber, under the provisions of Chapter 14650, Laws of Florida, Acts of 1931, shall be entitled, upon the payment of the required fee, to obtain as a barber a certificate of registration under this Act, or as an apprentice barber a permit as an apprentice barber under the provisions of this Act without examination, *but before an apprentice barber shall be entitled to a certificate of registration as a barber, he or she shall be required to take an examination.* (Emphasis supplied.)

Said §12, which was applicable only to those who were licensed under the 1931 law, supra, was subsequently repealed in 1941 by §16.20, F. S.

In light of the foregoing, it is my opinion that Ch. 476, F. S., does not contain a "grandfather provision" that would permit a person seeking to be licensed thereunder, to receive a certificate of registration as a barber or apprentice barber without an examination.

064-131—September 10, 1964

REGULATION OF VOCATIONS AND PROFESSIONS

PREREQUISITE FOR CERTIFICATE TO TEACH COSMETOLOGY—§§477.08(6)(d), 477.06(1)(c), 477.07; CH. 477, F. S.; CH. 63-195, LAWS OF FLORIDA

To: *Juanita W. Saunders, Executive Secretary, State Board of Cosmetology, Tallahassee*

QUESTION:

Is the 12-month period during which a registered junior cosmetologist must practice before being qualified to receive a certificate as a cosmetologist to be counted toward the 5 years of practice required of one seeking a certificate of registration as an instructor of cosmetology?

In order for a person to receive a certificate as a cosmetologist it is necessary, among other things, that such person "practice as a registered junior cosmetologist for a period of 12 months under the immediate supervision of a registered cosmetologist," as required by §477.06(1)(c), F. S. Persons entitled to receive a certificate of registration as a junior cosmetologist must comply with §477.07, F. S.

From a reading of the applicable provisions of Ch. 477, F. S., it appears that the first step upon graduation from a school of cosmetology is to secure a certificate as a junior cosmetologist. (See §477.07, F. S.) After a period of 12 months under the immediate supervision of a *registered* cosmetologist, which would appear to be analogous to a period of apprenticeship or internship, a *junior* cosmetologist would then be eligible to secure a certificate to practice as a *registered* cosmetologist. (See §477.06, F. S.) If a person desires to become an instructor of cosmetology he must, among other things, prove that he was a "registered, practicing cosmetologist for at least five years" as hereinafter set forth:

Section 477.08(6), and (d), F. S., provides:

Any person is qualified to receive a certificate of registration as an instructor of cosmetology:

* * *

(d) *Who was a registered, practicing cosmetologist for at least five years, before being allowed to take the teachers' examination, provided that persons who have had at least one year in a college are exempted from this requirement. (Emphasis supplied.)*

From an examination of Ch. 477, F. S., as it pertains to a *junior* cosmetologist and *registered* cosmetologist, it is apparent that there is a distinction between the terms "junior cosmetologist" and "registered cosmetologist." It would seem that the provisions of §477.08(6)(d), F. S., referring to 5 years as a registered, practicing cosmetologist would not embrace the 12-month period of practice as a "junior cosmetologist."

Further support for this conclusion may be found by examining the applicable provisions of Ch. 477, F. S., as they existed prior to their amendment on May 28, 1963, by Ch. 63-195. Section 12 of said chapter changed the reference from the "Florida Beauty Culture Law" to the "Florida Cosmetology Law," and among other things, substituted the words "junior cosmetologist" for "junior operator"; "cosmetologist" for "beautician"; and "instructor of cosmetology" for "beauty culture teacher." Therefore, prior to May 28, 1963, only a person who was a "practicing, registered beautician" for at least 5 years was eligible to receive a certificate as a beauty culture teacher and a "junior operator" (now junior cosmetologist) was not construed as being the same as a "practicing, registered beautician," nor could the 12-month period of practice as a junior operator be logically included in the 5-year beautician requisite. Furthermore, it does not appear to have been the legislative intent, by substituting the words "junior cosmetologist" for the words "junior operator," to change the requirement of 5 years as a "registered, practicing beautician or registered, practicing cosmetologist" in order to be eligible for a certificate as an "instructor of cosmetology" or "beauty school teacher."

Therefore, the 12-month period during which a registered junior cosmetologist must practice before being qualified to receive a certificate as a cosmetologist may not be counted toward the five years of practice required of one seeking a certificate of registration as an instructor of cosmetology.

064-132—September 10, 1964

PUBLIC RECORDS

FLORIDA COUNCIL—CONFIDENTIALITY OF CASE FILES

To: *Murdock Martin, Executive Director, Florida Council for the Blind, Tampa*

QUESTION:

Are case files of the Florida council for the blind confidential material and may access to such files be denied the client involved?

The case files of clients of the Florida council for the blind contain, among other things, the medical records, observations, and comments of the examining physician, observations, comments and diagnosis of examining psychiatrists, psychologists, and other case workers for the Florida council for the blind, as well as records received from other cooperating agencies, including the state welfare board, the division of vocational rehabilitation and other hospital and medical records relating to the client.

The bulk of this material represents the work product of the various agencies and individuals who have worked with the rehabilitation program of the particular client. The relationship between the social service agencies and its personnel and the client is analogous to that between a physician and his patient. Such records, information and observations as may be recorded by these personnel are traditionally regarded as confidential material. Public policy protects unwarranted invasion or disclosure of such information in order to protect the individual client, as well as the professional relationship between the client and those who seek to serve him.

Physicians, psychiatrists and social service agencies agree that the release of case records to clients would seriously hamper the effectiveness of the case development process and would not be in the best interest of the client. In some cases where mental problems are involved, revealing contents of the case files to the client might not only be dangerous to the welfare of the client and his prospects for rehabilitation, but could cause dangerous and violent reactions in the client towards the counselor, physician, or psychiatrist who is treating him. To allow the client to have access to these files would eventually destroy the relationship between the professional people and the client. It would undoubtedly cause counselors, physicians and psychiatrists to refuse to record many observations and professional judgments for fear of the damage which might result in case this material should be revealed to the client.

Federal regulations, adopted to supplement the requirements of the vocational rehabilitation act, as set forth in 29 U.S.C.A., §35, require agencies such as the Florida council for the blind, operating within the scope of the federal vocational rehabilitation program to maintain the confidentiality of this material. Section 401.22 of the regulations provides as follows:

The State Plan shall provide that the state agency will adopt such regulations as are necessary to assure that:

(1) All information as to personal facts given or made available to the state or local rehabilitation agency, its representatives, or its employees in the course of the administration of the vocational rehabilitation program, including lists of names and addresses and records of agency evaluation, shall be held to be confidential.

(2) The use of such information and records shall be limited to purposes directly connected with the administration of the vocational rehabilitation program and may not be disclosed, directly or indirectly, other than in the administration thereof, unless the consent of the client to such release has been obtained either expressly or by necessary implication. Release of information to employers in connection with the placement of the client may be considered as release of information in connection with the administration of the vocational rehabilitation program. Such information may, however, be released to welfare agencies or programs from which the client has requested certain services under circumstances from which his consent may be presumed, provided such agencies have adopted regulations which will assure that the information will be held confidential, and can assure that the information will be used only for purposes for which it is provided.

(3) All such information is the property of the state agency or of the state and local rehabilitation agency, and may be used only in accordance with the agency's regulations.

The State Plan shall further provide that the state agency will adopt such procedures and standards as are necessary to:

- (1) Give effect to its regulations;
- (2) Assure that all rehabilitation clients and interested persons will be informed as to the confidentiality of vocational rehabilitation information;
- (3) Assure the adoption of such office practices and

the availability of such office facilities and equipment as will assure the adequate protection of the confidentiality of such records.

Though the Florida council for the blind is an agency of the state, it is well established in Florida, as well as in other jurisdictions, that the right of inspection does not extend to all public records or documents and that public policy demands that some of them be kept secret. *Lee v. Beach Publishing Co.*, 173 So. 440, 76 C.J.S., Records, §36. This is particularly true in public institutions such as insane asylums, state hospitals, welfare agencies, and rehabilitation hospitals and agencies.

I am, therefore, of the opinion that the case files of the Florida council for the blind are confidential material and that such information should be released only when consistent with the public policy of the state and policies, rules and regulations established by the Florida council for the blind and cooperating agencies.

064-133—September 11, 1964

MILK, CREAM AND MILK PRODUCTS

SALE IN FLORIDA OF OUT-OF-STATE PRODUCED MILK— §502.04, F. S.

To: *Doyle Conner, Commissioner of Agriculture, Tallahassee*

QUESTIONS:

1. May milk produced in another state under procedures which do not meet the specifications of Grade A milk, set forth in the laws of Florida and the applicable rules of the department of agriculture, be sold in Florida as Grade A milk?

2. If question 1 is answered in the negative, may such milk be sold in Florida without grade designation?

3. May the commissioner of agriculture, pursuant to the laws of Florida, impose the rules of the department of agriculture upon out-of-state producers of milk in the production of Grade A milk to be sold in Florida; and may the commissioner make on-sight personal inspection, through his representatives, in states outside Florida to determine whether the production of milk to be sold in Florida is in compliance with Florida specifications and to insure for the purposes of public health and welfare that milk brought into Florida is unadulterated and free from contamination?

It is my opinion that question 1 must be answered in the negative. It is the well-settled statement of the law of this state, and of the several states of these United States, that a state acting under its basic police power "may determine the standard of quality of milk, prohibit the production, sale or distribution of milk not within such standard, divide the standard into classes, and regulate the manner of their use, so long as these standards, classes, and regulatory provisions are neither unreasonable nor oppressive . . . such legislation is, therefore, a proper exercise of the police power for protection of the health of the people and the prevention of fraud and imposition?" 22 Am. Jur. 855, §63. See also the numerous and long line of cases in support thereof which are annotated at

80 A.L.R. 1226, 101 A.L.R. 67, 110 A.L.R. 649, 119 A.L.R. 246, and 155 A.L.R. 1396, *Noble v. Carlton* (D.C. Fla.) 36 F.2d, 967, at 968.

It would appear that the answer to question 2 may be answered by looking to the provisions of §502.04, F. S., which states in part, "all milk and cream shall, when sold in bottles or other receptacles to customers or to dealers for resale to customers, be plainly and conspicuously labeled in such manner *as may be prescribed by the Commissioner of Agriculture as will show the grade under which it is sold and the source of production of same.* . . ." (Emphasis supplied.)

It is my opinion the plain language of the above statutory provision answers question 2 in the negative. Section 502.04, F. S., clearly states that all milk when sold to customers or dealers for resale to customers is to be plainly labeled in the manner prescribed by the commissioner of agriculture and such label is to show the grade under which the milk is sold. The provisions of the Florida law having specifically stated that the label which is to be required upon milk sold is to show its "grade" it would, therefore, appear that the sale of ungraded milk would be repugnant to and therefore in violation of the said provisions of §502.04, F. S.

When considering the words, "will show *the grade* under which it is sold," (Emphasis supplied.) it would appear of statutory construction expressed many times by the supreme court of Florida is indeed applicable, and that is *Expressio Unius est Exclusio Alterius*, and this rule of statutory construction means, "where a statute enumerates certain things on which it is to operate, all things or acts not expressly mentioned are excluded," *Dobbs v. Sea Isle Hotel, Fla.*, 56 So.2d 341.

In plain language, §502.04, F. S., requires that milk sold under said section be labeled and that said label is to contain the grade of the milk to be sold therein. Since ungraded milk obviously is not a grade or has not been graded, the sale of such ungraded milk would be in violation of said section and, therefore, unauthorized.

In answer to question 3, it is my understanding that the department of agriculture has by administrative construction of the laws of Florida and in keeping with the basic police power of the sovereign to insure and protect the health, safety and welfare of the public, for some *thirty years* last past interpreted the F. S. and its authority under the police power to give to the commissioner of agriculture the power to impose reasonable and applicable rules of the department of agriculture upon out-of-state producers of milk in the production of Grade A milk to be sold in Florida and to allow the commissioner to make on sight personal inspection, through his representatives, in states outside Florida to determine whether the production of milk to be sold in Florida is in compliance with Florida specifications and to insure for the purposes of public health and welfare that milk brought into Florida is unadulterated and free from contamination.

However, it would appear that the rules of the department of agriculture which are to be applied to the out-of-state producers of milk must, to avoid a restraint upon interstate commerce, be those rules and regulations which have a direct bearing upon and are designed to insure that the milk itself which is to be imported into Florida is free from contamination and unadulterated. It would accordingly appear that those rules and regulations which are

directed to dairy and milking barn structure and appearance may very well, when applied to out-of-state producers of milk, be deemed by the federal courts as an unreasonable burden upon interstate commerce, if as a matter of fact the milk product to be shipped into Florida "is unadulterated and free from contamination."

With regard to the weight and validity the courts will give to administrative construction of statutes the supreme court of Florida in *Green v. Stuckeys of Fanning Springs*, 99 So.2d 867 at 868, stated:

While not necessarily controlling, as where made without the authority of or repugnant to the provisions of a statute, the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction 'except for the most cogent reasons, and unless clearly erroneous.' *Wilkes & Pittman v. Pittman* Fla. 1957, 92 So.2d 822, 825, and cases cited; *Gay v. Canada Dry Bottling Co.*, Fla. 1952, 59 So.2d 788, 790.

I find no recent law which should require the department of agriculture to alter its administrative interpretation of some 30 years standing so long as said rules and out-of-state inspections are not designed to exclude out-of-state milk from being brought into Florida and, therefore, an "unreasonable clog upon the mobility of interstate commerce," *Baldwin v. Seelig*, 294 U.S. 511, 79 L.Ed. 1032, at 1040. See also an exhaustive annotation at 14 A.L.R. 2d 103.

In this regard, a distinction should be made between the facts presented and the recent ruling of the U. S. supreme court in the case of *Polar Ice Cream and Creamery Co., v. Andrews*, 375 U.S. 361, 11 L.Ed. 2d 389. This case dealt primarily with the rules and regulations of the Florida milk commission, the setting of a minimum base price and the allocation of milk produced by Florida distributors and held that said regulations constituted an unreasonable burden upon interstate commerce. In speaking of what the court considered a burden upon interstate commerce in the *Polar Ice Cream* case, (quoting from the case of *Baldwin v. Seelig*), it was stated, "nice distinction between direct and indirect burdens were said to be irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency is to suppress or mitigate the consequences of competition between the stated . . ."

The court in the *Polar Ice Cream* case, when speaking of the allocation of Florida milk prior to milk brought in from out-of-state, stated, "the exclusion of foreign milk as an economic measure to protect the welfare of Florida dairy farmers or as a health measure designed to insure the existence of a wholesome supply of milk. This much *Baldwin* and *Dean* made clear." The *Polar Ice Cream* case is here cited so that you might view the recent thought of the U. S. supreme court on what it considers a burden upon interstate commerce.

22 Am. Jur. 856, §65 states: "It is clearly proper for the legislature, in the exercise of its police power for the protection of the public health, to forbid the sale of adulterated milk . . . It may declare that milk below a certain specified standard shall be deemed to be adulterated or may forbid the use of any preservative or artificial coloring in milk offered for sale . . . without depriving vendors of such milk of property in violation of the state or federal constitution."

In the case of *Miller v. Williams*, 12 F. Supp. 236, the court states: "Local regulations of interstate commerce under guise of police power which are not reasonably adapted to accomplish legitimate end of protection of health, morals, and welfare of community and constitute direct burden on interstate commerce are invalid."

For these reasons the rules and regulations of the department of agriculture which have a direct relation to out-of-state producers of milk and are designed to insure that the milk which is to be imported into Florida is free from contamination and adulteration would be sustained by the courts and not constitute an unreasonable restraint on interstate commerce.

In light of the above statutes and authorities, your questions are specifically answered as follows:

AS TO QUESTION 1:

Milk produced in other states under procedures which do not meet specifications as Grade A milk as set forth by the laws of Florida and the applicable rules and regulations of the department of agriculture may not be sold in Florida as Grade A milk so long as said rules and regulations do not constitute a burden on interstate commerce and question 1 is therefore answered in the negative.

AS TO QUESTION 2:

Section 502.04, F. S., prohibits the sale of milk in Florida without grade designation and question 2 is therefore answered in the negative.

AS TO QUESTION 3:

The commissioner of agriculture may make or cause to be made on site personal inspections in states outside Florida to determine whether the production of milk which is to be sold in Florida is in compliance with Florida specifications so long as said inspections are for the purpose of insuring that milk brought into Florida is unadulterated and free from contamination and so long as the standards used for the grading of the milk are reasonable and question 3 is therefore answered in the affirmative.

064-134—September 11, 1964

COUNTY FINANCE

**COUNTY BUDGET—PHYSICIAN TO EXAMINE COUNTY
EMPLOYEES—CH. 440, §§440.38(5), 125.01(3), F. S.**

To: Frank A. Pavese, County Attorney, Lee County, Fort Myers

QUESTION:

May the county legally budget an item in the general fund or the road and bridge fund to pay for a physician to make physical examinations of certain employees of the county in order to reduce the county's workmen's compensation insurance?

First, the term "employment" as used in the workmen's compensation law of Florida, Ch. 440, F. S., includes employment by the state "and all political subdivisions thereof, . . ." which means that every county is an employer and its employees are covered by the terms of the workmen's compensation law.

Section 440.38(5), F. S., empowers political subdivisions "to procure and maintain insurance to secure the benefits of this chap-

ter to their employees and they are hereby authorized to pay the premiums for said insurance." (AGO 050-353.) The foregoing authority contemplates that physical examinations would be made by the county as the employer, acting through a licensed physician. It might be well to rotate such employment among licensed physicians of Lee county, to avoid any suggestion of favoritism.

It follows, therefore, that claims for such compensation will be made against the county as such employer, including Lee county. It is the duty of Lee county board of commissioners "to represent the county in the defense of all legal causes . . ." (§125.01(3), F. S.) which necessarily will include any legal action taken by an injured or incapacitated county employee to enforce his rights under the workmen's compensation law.

As a feature of such defense, the county prudently should have a continuous record of the physical condition of its employees, made by one who could qualify as an authority in such matters, a licensed physician. Only by establishing such a basis for possible defense against workmen's compensation claims may the county commission fulfill its obligation for defending the county against legal attack.

Such defense being a legitimate and authorized county purpose, the county is authorized to retain the services of a licensed physician as an incident thereto.

Accordingly, your question is answered in the affirmative.

064-135—September 11, 1964

TAXATION

TAXATION PAYABLE ON AGREEMENTS FOR DEEDS UNDER §199.02, F. S.—§§192.03, 199.05, 199.11, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are intangible taxes payable on contracts and agreements for deed on the full amount of an agreement where there is an existing mortgage, less down payment?

The courts of this state, in *Jasper v. Orange Lake Homes, Inc.*, Fla. App., 151 So.2d 331, (Certiorari denied by the supreme court of Florida, 155 So.2d 694), determined that the ordinary agreement for the sale and conveyance of real property was class "C" intangible personal property, as defined in §199.02, F. S., and subject to taxation under §199.11 under such classification. Section 199.05, F. S., requires that "the tax assessor shall assess all intangible personal property at its full cash value." In *Green v. Walter*, Fla., 161 So.2d 830, this statute was construed as requiring assessment on the basis of such "full cash value" and not on the basis of a percentage of such full cash value. Therefore contract and agreements for deeds, as described in the question above posed, are required to be assessed for purposes of taxation "at their full cash value."

The term "full cash value" was defined in *Hillsborough County v. Knight & Wall Company*, 153 Fla. 346, 14 So.2d 703, text 705, where the property is such as is "commonly bought and sold, the price which it brings is the best test of the value." In *Peters v.*

Hansen, Fla., App., 157 So.2d 103, text 105, the court remarked that "fair market value is the amount of money which a purchaser, willing but not obliged to buy the property would pay to an owner willing but not obliged to sell," would pay for the same. See also 17 Words and Phrases 774 et seq., where are found the following definitions of "full cash value":

The amount at which property would be taken in payment of a just debt due from a solvent debtor. (Crocker v. Scott, 149 Cal. 575, 87 P. 102, text 106; Parsons v. Detroit & Canada Tunnel Co., DC Mich., 15 F. Supp. 986, text 1001; Re. Castle, 15 Haw. 1; Ballerino v. Mason, 83 Cal. 447, 23 P. 530; San Francisco National Bank v. Dodge, 197 U.S. 70, 25 Sup. Ct. 384, 49 L.Ed. 669; Humbird Lumber Co. v. Thompson, Idaho 614, 83 P. 941, text 945);

The salable value of the property if put on the market, and like and similar definitions.

In Great Northern Railway Co. v. Weeks, 297 U.S. 135, text 139, 56 Sup. Ct. 426, text 428, 80 L.Ed. 532, text 535 and 536, it was held that the full and true value of property "is the amount that the owner would be entitled to receive as just compensation upon a taking of that property by the state or the U. S. in the exercise of the power of eminent domain. That value is the equivalent of the property, in money paid at the time of the taking." See also the definition of "Cash Value" in 14 CJS 21 and 22.

From these authorities we must conclude that the value of a vendor's interest in a contract to sell and convey real property is the amount at which such contract would be appraised if taken in payment of a just debt from a solvent debtor; the price which the vendor's interest in the contract would bring if offered for sale by one who desires to sell, but is not compelled to do so, and is bought by one who desires to purchase, but is not compelled to do so; the usual selling price of like contracts at private sales and not at a forced or auction sale.

The file handed us with your request for opinion mentions a contract for the sale of a parcel of real estate for a total consideration of \$35,000 upon which there is an existing obligation evidenced by a promissory note, secured by a mortgage encumbering the said real estate, upon which there is an unpaid balance of \$28,000 which the purchaser assumes and agrees to pay, upon which contract for the sale of realty there is paid by the purchaser to the seller the sum of \$2,000, leaving an unpaid balance due the seller by the purchaser of \$5,000 payable at the rate of \$58 per month. The \$28,000 obligation is not held by the seller or vendor but by another who may look to the seller, under his prior obligation therefor, to the purchaser under his assumption agreement, and to the real property itself, for the payment of the said \$28,000 obligation. Under this transaction it appears that the only monetary obligation held by the seller from the purchaser is the \$5,000 obligation, payable at the rate of \$58 per month. We are not advised as to the rate of interest on the unpaid portion of the said \$5,000 obligation. This would appear to be the only item of intangible personal property coming to the seller from the above described transaction. This obligation would appear to have a presumed value equal to the remaining portion of the \$5,000 obligation remaining unpaid on the tax day, that is, January 1 of the tax year. It is

provided in §192.03, F. S., that taxable property includes "debts due or to become due from solvent debtors whether on account, contract, note or otherwise." This seems to imply that the solvency of the debtor is an element that may be taken into consideration when fixing the value of an intangible. Borrowing language from §199.05, F. S., the above obligation incurred by the purchaser to the seller should be assessed for intangible tax purposes at "its full cash value" as above discussed.

064-136—September 11, 1964

COUNTY FINANCE

TAX ASSESSOR'S OFFICE—EXPENSE OF ASSESSOR AND DEPUTY FOR SHORT COURSES RELATING TO APPRAISAL OF REAL PROPERTY

To: Ernest Ellison, C.P.A., State Auditor, Tallahassee

QUESTIONS:

1. Is it a proper expense of the office of assessor of taxes to expend public moneys for the costs of the tax assessor or his deputies attending schools to take "short" courses covering various phases of advanced and up-to-date appraisal of real property?

2. If our answer to question 1, is in the affirmative, is the examination and certificate fee for a master appraiser's rating and the dues for membership in the society of real estate appraisers of America or similar associations proper charges to the expense of the assessor's office?

As to question 1, it appears from the facts of your letter that some of the universities in this area offer what may be termed a two-week "short" course covering the various aspects and modern trends in the appraisal of real property. Because of the changing complexity of the many areas of this state, which in some instances may have been predominantly rural, but might find themselves with a substantially urban population, together with the change to what in some areas might have once been predominantly rural ownership of real property to what may now be termed urban business property, many tax assessors or their deputies have registered for and have attended courses, usually of some 2 weeks in duration, covering the various aspects and modern trends in the appraisal of real property—agricultural, rural and urban.

It would appear that the various tax assessors have a duty and a legal obligation to insure the public that real and personal property situated within their jurisdiction is properly appraised and assessed in accordance with the constitution and the laws of the state of Florida. To insure that real and personal property have been constitutionally appraised and assessed, various counties throughout the state have made expenditures of public money for the purpose of bringing in private appraisers to assist tax assessors in the proper evaluation and appraisal of real and personal property within their jurisdiction. It would, therefore, appear that the various short courses which you have set out in the facts of your letter would appear to be of direct benefit to the taxpayer and, in many instances, may save the taxpayer the neces-

sity of bringing in private appraisers to assist the tax assessor in the performance of his constitutional duty. While it might be said that there is some incidental benefit which may be derived and which might be used by the individual himself, it would appear that the direct benefit inures to the public.

This opinion is not in conflict with and, in fact, reiterates AGO 062-97, that opinion in part states:

There is no general rule which may be applied equally to all factual situations—each case must stand on its own—and in the consideration of each case the primary test to be applied is whether the training program is one which, although designed to improve the efficiency of the employee, will benefit the public. Unless the training will be of direct public benefit it may not be given in the absence of specific legislative authority. Training and education of a formal nature for employees to fit them basically for the performance of their duties, as distinguished from training specifically designed to improve the efficiency of a qualified employee, may not be given at public expense.

In answer to question 2, it would appear that the examination and certificate fee for a master appraiser's rating and the dues for membership in the society of real estate appraisers of America, or similar associations, are *not* proper charges to the expense of the assessor's office in light of the fact that while the public may derive an insignificant, indirect benefit from the above, these expenditures, as above outlined, are more directly associated as benefit to the particular individual, be it tax assessor or his deputy, and are of more benefit to him in an individual personal manner than the incidental benefit which the public may derive thereby. Question 2 is, therefore, answered in the negative.

The above-stated questions are, therefore, answered in the following manner:

AS TO QUESTION 1:

It is a proper expense of the office of the assessor of taxes to expend public moneys for the cost of the tax assessor or his deputies attending schools to take "short courses" covering various phases of up-to-date appraisal of real property, provided, however, it is *not* a proper expense of the office of tax assessor to expend public moneys for the initial schooling and training of those persons who are not in the first instance qualified to perform the duties for which they are employed. While we have answered question 1 in the affirmative, the only training which is hereby authorized is that training which is designed to improve the efficiency of an otherwise qualified employee.

AS TO QUESTION 2:

It is not a proper expense of the office of the tax assessor to expend public moneys for the payment of examination and certificate fees for a master appraiser's rating or for the dues for membership in various social or professional societies, for the above provides no direct benefit to the public and is rather of benefit to the individual.

064-137—September 15, 1964

MOTOR VEHICLES

DRIVERS LICENSES—FEE REQUIRED FOR RE-EXAMINATION OF PERSONS REINSTATED TO COMPETENCY—
§§322.05, 322.12, 322.27, F. S.

To: *H. N. Kirkman, Director, Department of Public Safety, Tallahassee*

QUESTION:

What is the required examination fee to charge applicants for reexamination, whose driving privilege has been suspended due to their having been adjudged incompetent by a court and later reinstated to competency, pursuant to §322.12, F. S.?

Section 322.12, F. S., provides in part as follows:

...every applicant shall be required to pay a fee of \$1.00 for each such examination; provided, however, that any person required to submit to an examination following the suspension or revocation of his driver's license shall be required to pay a fee of \$5.00 for such *additional examination*. (Emphasis supplied.)

Section 322.27, F. S., authorizes the department to suspend driver's licenses upon a showing that the licensee "is incompetent to drive a motor vehicle."

Section 322.05, F. S., provides that the department shall not issue any driver's license to

... any person who has been adjudged to be afflicted with, or suffering from any mental disability or disease and who has not at the time of application been restored to competency by methods provided by law.

Where a person has been declared to be incompetent by an appropriate court, the department is both under the duty to suspend any existing driver's license and prohibited from issuing any new license until such time as the individual has been restored to competency.

The statute requires every applicant to pay a fee of \$1 for the first examination and a fee of \$5 for any "additional examination" which would be required by reason of his failure to pass the first examination. This does not contemplate that when an individual, through no fault of his own is required to take the examination for the first time, must pay the \$5 fee.

Thus, any individual whose license has been suspended by reason of his having been declared mentally incompetent would upon taking the examination be required to pay the \$1 fee pursuant to §322.12, F. S.

064-139—September 16, 1964

TAXATION

BACK ASSESSMENTS OF OMITTED PROPERTIES, INSUFFICIENT ASSESSMENTS, ETC.—§§193.23, 199.29, 200.16; CH. 200, F. S.; CHS. 1713, 1869; 20723, 1941; 20724, 1941,
LAWS OF FLORIDA

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May an assessor of taxes in Florida back-assess properties for years for which there were insufficient valuations of the properties assessed?

We have examined your file handed us with your request for opinion of August 11, 1964, from which we gather that certain taxable properties located and subject to ad valorem taxation in Palm Beach county were undervalued for the years 1961, 1962 and 1963, which undervaluation was not discovered by the county assessor of taxes until in 1964, when the undervaluation was discovered in connection with the preparation of the 1964 tax rolls. We gather from your said file that additional valuations and assessments were made on the 1964 tangible personal property tax roll as follows: For the tax year of 1961 the sum of \$2,200,000; for the tax year of 1962 the sum of \$2,200,000, and for the tax year of 1963 the sum of \$1,750,000. That additional assessments were made on the 1964 real property tax roll as follows: For tax year of 1961 the sum of \$747,600; for the tax year of 1962 the sum of \$747,600, and for the tax year of 1963 the sum of \$704,000. The latter additional assessments may have represented improvements on the lands not included in the 1961, 1962 and 1963 assessments of the real property upon which located, of which the assessor of taxes may not have been advised.

Section 193.23, F. S., which appears to be applicable to real property, insofar as here material, provides that:

When it shall appear that any ad valorem tax might have been lawfully assessed or collected upon any property in the state, *but that such tax was not lawfully assessed or levied, and has not been collected for any year within a period of three years next preceding the year in which it is ascertained that such tax has not been assessed, or levied, or collected*, then the officers authorized shall make the assessment of taxes upon such property *in addition to the assessment of such property for the current year*, and shall assess the same separately for such property *as may have escaped taxation* at and upon the basis of valuation applied to such property *for the year or years in which it escaped taxation*, noting distinctly the year when such property escaped taxation and such assessment shall have the same force and effect as it would have had if it had been made in the year in which the property shall have escaped taxation, and taxes shall be levied and collected thereon in like manner and together with taxes for the current year in which the assessment is made. But no property shall be assessed for more than three years' arrears of taxation . . . (Emphasis supplied.)

Provisions like or similar to said §193.23, F. S., have been in force in Florida since §24, Ch. 1713, 1869, if not prior thereto. Said §193.23 appears to have been applicable to both real and tangible personal property prior to the adoption of §15, Ch. 20723, 1941, now appearing as §200.16, F. S., which section is applicable to tangible personal property. Section 199.29, F. S., which was derived from §31, Ch. 20724, 1941, is applicable to intangible personal property, and provides substantially as does said §200.16, F. S.

Said §200.16, F. S., is as follows:

If any tax assessor when making his assessment shall discover that any tangible personal property has for any reason *escaped taxation* for any or all of the three previous years, he shall, *in addition to the assessment of such tangible personal property* for that year, assess the same separately for such year or years that it may have *escaped taxation* at the full cash value thereof, in such year, noting distinctly the year when such tangible property *escaped taxation*, and such assessment shall have the same force and effect as it would have had if made in the year that the same escaped taxation, and taxes thereon shall be levied and collected thereon in like manner and together with the taxes of the year in which the assessment is made. Provided, that tangible personal property acquired in good faith by purchase shall not be subject to assessment for taxes for any time prior to the time of such purchase, but the individual or corporation liable for any such assessment shall continue personally liable for same. (Emphasis supplied.)

We are here primarily concerned with the application of §§193.23 and 200.16, F. S., to those cases where taxes have been assessed on taxable properties, but such assessments have been made on the basis of an insufficient valuation, not those cases where there has been an omission to tax at all. Said sections are clearly applicable to cases where there has been an omission to tax at all.

Although applicable to §199.29, F. S., and to the assessment of intangible personal property, and not to tangible personal property or to real property, we feel that the court's opinion in Florida Nat'l Bank v. Simpson, Fla., 59 So.2d 751, text 758, is of assistance here, in that it construes said §199.29, F. S., which in the language used is substantially the same as §200.16, here involved and to be construed. The taxes provided for in said §§199.29 and 200.16, F. S., are *ad valorem* taxes; hence the taxes are necessarily computed upon and fixed according to the value of the property taxed. In said Florida Nat'l Bank v. Simpson, *supra*, the court said:

There is no provision in Chapter 199, *supra*, which authorizes a tax upon only a part of an intangible returned for taxation by the owner thereof albeit separate distinct interests therein, each of which in and of itself may be said to constitute a species of intangible personal property, might be independently taxed.

The intangible is the property of the taxpayer which is the subject of taxation. If the intangible has been honestly returned and assessed for taxation, regardless of the valuation placed upon it, and the tax has been paid, the intangible has been taxed and thereafter cannot be said to have 'escaped taxation.' It is either taxed or is not taxed.

In the latter event only has it 'escaped taxation.' The language above-quoted would appear to be equally applicable to Ch. 200, F. S. In this same case (59 So.2d text 758) there is the further statement that "intangible personal property cannot be back-assessed, regardless of the fact that subsequently the tax assessor might decide that it was returned and assessed at a valuation less than its full cash value." The language used in this case concerning language used in *Root v. Wood*, 155 Fla. 613, 21 So.2d 136 (59 So.2d 759) indicating a right to make such back assessments, seems to disapprove the language used in said *Root v. Wood*, insofar as it may be read as authorizing additional assessments under said §199.29. The case of *Graham v. Florida Land and Mortgage Co.*, 33 Fla. 356, 14 So. 796, text 802 and 803, appears to hold that where an assessment is made for a particular year or years against certain lands, which assessment is paid, no further assessments may be made against such lands, by back assessment or otherwise, for the years for which taxes were assessed and paid. Although the legislature has the power to authorize reassessments where there has been an undervaluation such a reassessment is usually held illegal when not so authorized (84 C.J.S. 817, §419).

In *Palmer v. Beadle County*, 70 S.D. 99, 15 N.W. 2d 6, text 70, a parcel of land was held not "omitted property" where the tax assessor undervalued it because of erroneously not including the value of buildings thereon. In *Hunt v. District of Columbia*, App. DC., 108 Fed. 2d 10, text 12, it was held that the power to assess "omitted property" did not carry with it the power to revalue property already assessed. See also *Thomas' Executors v. Commonwealth*, 308 Ky. 695, 215 S.W. 2d 546, text 550; *Kentucky Tax Commission v. Airlene Gas Company*, Ky., 328 S.W. 2d 832, text 833, to substantially the same effect.

From the above and foregoing it appears that there is a distinction between an omission of taxable property from the tax and an undervaluation of property; the omission of taxable property from the tax roll is within the purview of §§193.23, 199.29 and 200.16, F. S.; however, the undervaluation of such properties is not an omission within said statutes. In the light of the above and foregoing, the above-stated question is answered in the negative. In this opinion we have not taken into consideration those cases where an actual and active fraud may have been practiced on the tax assessor by a taxpayer designed to procure an undervaluation of the properties taxed, there being no evidence thereof or mention made thereof in the file before us.

064-140—September 18, 1964

TAXATION

TAX EQUALIZATION—PROCEDURE—POWERS AND DUTIES OF BOARD OF TAX EQUALIZATION—§§192.21, 193.021, 193.11(3), 193.25, 193.27, 196.01, F. S.; CH. 63-250, LAWS OF FLORIDA; §1, ART. IX, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What are the duties and powers of the board of county commissioners, sitting as a board of tax equalization pursuant to §193.25, F. S.?

Boards of county commissioners of the several counties of the state are designated as the boards of tax equalization of such counties. After the preliminary tax rolls of the county have been prepared by the county assessor of taxes he is required by §193.25, F. S., to meet with the said board of tax equalization for his county "for the purpose of hearing complaints and receiving testimony as to the value of any property, real or personal, as fixed by the county assessor of taxes, of perfecting, reviewing and equalizing the assessments . . ." Due notice must be given the taxpayers of the county tax equalization meeting, in the manner provided in said §193.25, at which hearing taxpayers may appear and file protests against the valuation placed on their properties for purposes of taxation. The statutes do not make the assessor of taxes a member of the county board of equalization, but merely require that he be present to defend his valuations and otherwise assist the said board of tax equalization in such manner as he may be able. Under §193.27, F. S., "the board of county commissioners may equalize the assessment of the real and personal property in their respective counties, and for that purpose may raise or lower the value fixed by the county assessor of taxes on any particular piece of real estate, or item or items of personal property . . ."

Section 1, Art. IX, State Const., requires that "the legislature shall provide for a uniform and equal rate of taxation . . . and shall prescribe such regulations as shall secure a *just valuation* of all property, both real and personal, exempting such property as may be exempted by law for municipal, educational, literary, scientific, religious and charitable purposes." (Emphasis supplied.) In *Tyson v. Lanier*, Fla., 156 So.2d 833, text 837, the supreme court of Florida remarked that "the district court of appeal was correct in holding that 'just valuation' as provided in the constitution was synonymous with 'full cash value' as provided in the statute." Section 193.021, F. S., added by §1, Ch. 63-250, provides a method and formula for determining the "just valuation" of real and personal property as contemplated and used in said §1, Art. IX, State Const. This section provides a formula from which the just valuation of taxable real and personal property is to be determined. Under this formula tax assessors, when fixing the value of taxable properties, are required to take into consideration the several factors mentioned in said §193.021, F. S. This same formula should be followed by the boards of county commissioners when sitting as boards of tax equalization, and valuations of real and tangible personal property must be determined by them. Equalization has been defined in Black's law dictionary as the "process of leveling or adjusting the assessments of individual taxpayers so that the property of one shall not be assessed at a higher, or lower, percentage of its market value than the property of another." The purpose of tax equalization under §193.25, F. S., is the adjustment of tax valuations so that the share of the taxes imposed be justly proportioned to the value of the properties subject to taxation. Equalization under §193.25 is designed to correct possible errors made by the tax assessor in the valuation and assessment of the taxes imposed. Through the process of equalization under said §193.25, the taxpayers are provided with a hearing on the question of the equality of his assessment with assessments against other property owners.

Under §192.21, F. S., taxing officials are permitted to correct their errors of omission and commission, the said statute provid-

ing that "no act of omission or commission on the part of any tax assessor, or any assistant tax assessor, or any tax collector, or any board of county commissioners . . . shall operate to defeat the payment of said taxes . . ." A taxpayer's appeal, from an assessment deemed erroneous by him, is to the board of tax equalization, under said §193.25, F. S., and if dissatisfied with the action of the board of equalization on his appeal, he may resort to the circuit court of the county under §196.01, F. S. Although boards of tax equalization may not make revaluations of lands generally, or of classes of lands, they may correct apparent errors of the assessor of taxes to the end that all tax valuations of the county will be on the basis of the just valuation required by §1, Art. IX, State Const., and §193.021, F. S., especially where there has been filed a protest concerning any such valuation.

Valuations of property for purposes of ad valorem taxation must have a just relation to the real value of the property assessed, and there must be no substantial inequality in the valuations of the various kinds and classes of property that is subject to taxation. (*Graham v. Tampa*, 71 Fla. 605, 71 So. 926, text 927; *Schleman v. Connecticut General Life Ins. Co.*, 151 Fla. 96, 9 So.2d, 197, text 199). When valuing properties for purposes of taxation, under and pursuant to §193.021, F. S., care should be taken by the assessor of taxes, or the board of tax equalization, as the case may be, that their valuations conform to the requirements of §193.021, F. S. Said §193.021, F. S., does not appear to be in conflict with §193.11(3), F. S., relating to the taxation of lands dedicated to and used for farming purposes within the purview of said §193.11(3). It was held, in *Tyson v. Lanier*, Fla., 156 So.2d 833, that the separate classification of farm lands dedicated and used for farming purposes in accordance with said §193.11(3), was a valid one. The formula and method of valuation of taxable properties under said §193.021, F. S., is not contrary to or in conflict with §193.11(3), when applied to lands dedicated to and used for farming purposes within the purview of said §193.11(3); the two provisions may be reconciled so that each provision has a field of operation, when considered and construed together. When valuing lands dedicated to farming operations, which are within the purview of §193.11(3), F. S., §193.021 should be followed, taking into consideration that such lands have been dedicated for farming purposes and not for any other purpose. The prospective value of such lands for purposes other than that of farming should not be taken into consideration.

Boards of tax equalization are not boards of revaluation but are boards of equalization. Their duties are that of the equalization of valuations as between taxable properties so that each taxpayer will be required to bear his just portion of the tax burden, and no more, when irregular or erroneous valuations of taxable properties are called to their attention by the taxpayer or otherwise. A taxpayer is within his right when making objection to irregular or erroneous valuations of his or other properties. Where there is an undervaluation of a class of properties, or even a single item of property, the owners of such undervalued properties will not pay their just share of the taxes, thereby indirectly imposing on others additional tax obligations not imposed on those whose properties are undervalued. Those whose properties are overvalued will be required to pay more than their just portion of the taxes. Although the statutes contemplate the objection by taxpayers whose proper-

ties have been overvalued as a predicate for equalization, it is apparent that other taxpayers may file objections to the undervaluation of the properties of others, and it seems proper for boards of equalization to take notice of patent, manifest and evident undervaluations which would, if not corrected, impose on other property owners an unjust tax burden; however, care should be taken in such cases that there is in truth and in fact an undervaluation of such nature.

The above observations point out the duties and powers of boards of county commissioners when sitting as boards of tax equalization.

064-141—September 25, 1964

PHARMACY BOARD

COMPENSATION—CONSTRUCTION OF §465.051, F. S., IN LIGHT OF CH. 63-400, LAWS OF FLORIDA

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is the comptroller of Florida authorized to make payments of \$35 per diem compensation to each member of the board of pharmacy while they are on official business, as was set forth in §465.051, F. S., 1961, in addition to travel expenses as provided in §112.061?

Section 465.051, F. S., 1961, contained the following language not included in the said section in the Florida Statutes, 1963, to wit: "Each member of the board shall be paid a per diem allowance not to exceed thirty-five dollars for time actually expended incident to attendance at board meetings or to the performance of other duties as a member of the board and shall also be reimbursed for expenses incident to attendance at board meetings or to the performance of other duties as a member of the board," which language was replaced in said §465.051 F. S., 1963, by the following language, to wit: "Each member of the board shall be reimbursed for traveling expenses as provided in section 112.061." The language in both the Florida Statutes, 1961, and the Florida Statutes, 1963, down to the first above-quoted language is the same and is verbatim. The history note to said §465.051, F. S., 1963, indicates an amendment by §19, Ch. 63-400.

Chapter 63-400, is primarily an act amending §112.061, F. S., which section is in fact amended by §1 of said Ch. 63-400. Subsequent §§2-18 of said chapter make specific amendments to portions of §§11.13, 13.01, 13.24, 102.021, 103.071, 103.102, 158.03, 230.201, 272.18, 298.14, 340.05, 388.141, 489.03, 550.03, 601.06, 625.121 and 641.07, each of which clearly relates to the per diem and travel expenses incurred by state officers and employees when traveling in connection with state business and their duties, and do not seem to relate to their salaries or other official compensation. It is clear from a reading of said §112.061, as amended by said §1 of Ch. 63-400, that said §112.061 was designed and intended to pay the authorized traveling expenses of the traveler and to reimburse him for his authorized lodging and meal expenses while traveling on state business. It does not cover, and was not intended to cover, the compensation, whether paid by the day, week or month, of the

traveling officer or employee as compensation for services performed.

We are confronted with the construction of the portion of said §465.051, F. S., 1961, which was deleted from said section in the Florida Statutes, 1963, that is, "each member of the board shall be paid a per diem allowance not to exceed thirty-five dollars for time actually expended incident to attendance at board meetings or to the performance of other duties as a member of the board and also be reimbursed for expenses incident to attendance at board meetings or to the performance of other duties as a member of the board." (Emphasis supplied.) The use of the words "and also" indicates something in addition to, something besides, or as well as, the matter or thing previously mentioned (Webster's dictionary; 3 Words and Phrases, Perm. Ed., 632 and 633). The phrase "and also be reimbursed for expenses incident to attendance at board meetings or to the performance of other duties as a member of the board" contained in the Florida Statutes, 1961, but omitted from the Florida Statutes, 1963, appears to relate to the expenses incurred by a traveler, and not to his compensation as an officer or employee, and seems to be substantially the same as is expressed in the Florida Statutes, 1963, by the following language, "each member of the board shall be reimbursed for traveling expenses as provided in section 112.061." The language "each member of the board shall be paid a per diem allowance not to exceed thirty-five dollars for time actually expended incident to attendance at board meetings or to the performance of other duties as a member of the board," contained in Florida Statutes, 1961, but omitted from the Florida Statutes, 1963, appears to have been intended as official compensation of the board members, and not as reimbursement of their travel expenses embraced within §112.061, F. S., as amended by Ch. 63-400. There appears to have been no conflict between the portion of §465.051, F. S., 1961, above-discussed, and said §112.061, F. S., as amended by Ch. 63-400.

The Florida Statutes, 1961, were codified by Ch. 63-2, with the amendments of §§16.19, 16.20, 16.22, 16.23 and 16.24, therein made, as and constituting the Florida Statutes, 1963, which act of codification became and was effective from and after April 10, 1963. Under existing statutes §§16.19, 16.20, 16.21, 16.22, 16.23, 16.24 and 16.44, F. S., the statutory revision department of the attorney general's office, prepared the "Florida Statutes, 1963," containing the provisions of the said Florida Statutes, 1961, and the compilation therein of the amendments, changes, extensions and additions made by the 1963 Florida legislature. In *Foley v. State*, Fla., 50 So.2d 179, it was stated that the adoption of the cumulative supplements of 1943 and 1945, made by Ch. 24337, acts of 1947, as the Florida Statutes, 1947, did not include as statute law the amendments, extensions, additions, etc., made by the 1947 legislature, which were compiled by the statutory revision department and included in the publication known as the cumulative supplement, 1947. In *Lipscomb v. Gialourakis*, 101 Fla.1130, 133 So.104, and *Lipscomb v. Kaloroukas*, 101 Fla. 1137, 133 So.107, it was held that the additions made in the compiled general laws, 1927, to the statutes contained in the Revised General Statutes of Florida, 1927, were not statutory law, but as to such additions were merely a compilation and therefore not statutory law as were the Revised General Statutes, 1920. These cases and observations lead to the view that the portions of the Florida Statutes, 1963, derived from

the Florida Statutes, 1961, without change by the 1963 legislature, is the evidence of the statutory law of Florida, and will control over the session laws from which derived, while the portion of the said Florida Statutes, 1963, derived from 1963 session laws, including amendments thereof made by the 1963 legislature, are merely compilations of the said 1963 laws, and merely presumptive evidence thereof, and will be controlled by the said 1963 enactments in case of conflict between the 1963 session laws and the said publication known and designated as the Florida Statutes, 1963.

In the light of the above and foregoing we hold that the omission of the following language, to wit: "each member of the board shall be paid a per diem allowance not to exceed thirty-five dollars for time actually expended incident to attendance at board meetings or to the performance of other duties as members of the board," was not repealed by reason of its omission from the publication known as the Florida Statutes, 1963, and has remained in force and effect. However, unless this error is corrected by an act of the 1965 legislature, or by the 1965 act adopting the 1963, Florida Statutes, as the Florida Statutes, 1965, the same will be repealed by reason of §16.20, F. S., if included in the 1965 act adopting the 1965 statutes.

Your above-stated question is answered in the affirmative up to the time of the adoption of the Florida Statutes, 1965, after which the question must be determined from the actions of the 1965 legislature.

064-142—September 24, 1964

COUNTY PUBLIC SCHOOL SYSTEM

SCHOOL BUILDINGS AND GROUNDS, USE OF—POLICIES DETERMINED BY COUNTY BOARD; AUTHORITY OF DISTRICT TRUSTEES—§§230.35 AND 230.43(5), F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

QUESTION:

Does the county board or the trustees have final authority in determining the types of activities that may be carried on in or on public school buildings or athletic fields?

Section 230.35, F. S., provides:

Schools under control of county board and county superintendent.—All public schools conducted within the county shall be under the direction and control of the county board with the county superintendent as executive officer and shall be subject to the same laws and rules and regulations as are prescribed for the conduct for all schools in the county, except as hereinafter provided.

In view of the above, it is my opinion that it is the duty of the county board of public instruction to establish policies relating to the types or kinds of programs and activities which can be conducted on school property.

It is the duty of district trustees as provided by §230.43(5), F. S., to permit the use of school buildings or premises for purposes

which are not inconsistent with the policies established by the county board of public instruction.

Subject to the above comments and cited statutory authority, the trustees may authorize use of school property for specific activities if such activities are consistent with the general policies established by the county school board.

064-143—September 28, 1964

TAXATION

EXEMPTIONS—CH. 199, F. S., CERTIFICATES HELD IN A UNIT TRUST ESTABLISHED UNDER THE INVESTMENT COMPANY ACT OF 1940—§§199.01, 199.02(5), 349.13, AND 423.03, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are certificates (fractional undivided interests in the trust fund) held by Florida residents in a unit investment trust, established under the investment company act of 1940, the trust fund holding only Florida nontaxable municipal securities, exempt from the provisions of Ch. 199, F. S.?

It appears from the facts of the file and exhibits forwarded to us with your request that there is proposed the establishment of a unit investment trust similar to the trust established pursuant to the "Trust Indenture and Agreement" dated Apr. 1, 1961, and amended on May 1, 1964, by and between Bache & Co. and Goodbody & Co., Depositors, Morgan Guaranty Trust Company of New York, Trustee, and Standard Statistics Co., Inc., Evaluator.

It is proposed that the sponsor and managing underwriter, on behalf of the other underwriters will purchase a diversified portfolio of tax exempt Florida municipal bonds (i. e., Florida municipal bonds which are exempt from the provisions of Ch. 199, F. S.) in the principal amount of approximately \$4 or \$5 million. The bonds would be deposited with a New York bank as trustee, pursuant to an irrevocable trust agreement, and certificates of beneficial ownership representing fractional undivided interest in the bonds composing the trust corpus will be delivered by the trustee for distribution to certificate holders including Florida residents by the underwriters. Except in the case of certain limited refunding, the trust agreement will prohibit the reinvesting of the trust corpus; and, upon the maturity or other disposition of all or part of the bonds composing the trust corpus, the proceeds thereof, less certain retainages and reserves, will be distributed to certificate holders.

The proposed trust agreement will relate to the sale of fractional undivided interest (the Units) in a trust fund established under the Investment Company Act of 1940. Such trust will be established pursuant to §3 of the Investment Company Act of 1940, and is classified as a "Unit Investment Trust" by §4(2), 15 U.S.C.A., §80a—4(2), which reads as follows:

(2) 'Unit investment trust' means an investment company which (A) is organized under a trust indenture, contract of custodianship or agency, or similar instrument,

(B) does not have a board of directors, and (C) issues only redeemable securities, each of which represents an undivided interest in a unit of specified securities; but does not include a voting trust.

The proposed trust agreement will contain a provision similar to the following:

Beneficiaries of Trust: Each certificate holder of record shall be deemed to be a beneficiary of the trust created by this agreement and vested with all right, title and interest in the trust fund to the extent of the unit or units set forth and evidenced by such certificates, subject to the terms and conditions of this agreement and of such certificate. The depositors hereby grant and convey all of their right, title and interest in and to the trust fund to each certificate holder to the extent of the fractional undivided interest of such certificate holder subject to and in pursuance of the agreement.

In addition, the proposed trust agreement will provide for the termination of the trust upon the maturity, redemption, sale or other disposition, as the case may be, of the last bond held pursuant to the agreement, unless sooner terminated, provided that in no event shall the trust continue beyond a specified date, and, within a reasonable period of time after such termination, the trustee will be required to fully liquidate the bonds then held, if any, and distribute to each certificate holder, upon surrender for cancellation of his certificate, or certificates, his pro rata share of the trust property.

"This is a democracy in which every parcel of property is expected to bear its due portion of the burden of government, unless exempted by the Legislature in the manner provided in Section 1, Article IX of the Constitution," (Bancroft Investment Corp. v. City of Jacksonville, 157 Fla. 546, 27 So.2d 162, text 170) or by the laws of the United States. See also §16, Art. XVI State Const. which requires that: "The property of all corporations . . . shall be subject to taxation, unless" exempted by law. Such bonds and other securities are intangible personal property, (§199.01, F. S.) and subject to taxation under Ch. 199, F. S., unless exempted by state or federal law.

Under §199.02(5), F. S., "intangible personal property belonging to the state or any political subdivision thereof, and intangible personal property belonging to any religious, charitable, benevolent or educational association shall be exempt from taxation."

It appears from the above and foregoing facts that the proposed unit investment trust is to hold tax exempt Florida municipal bonds and securities (i. e., Florida municipal bonds and securities which are exempt from the provisions of Ch. 199, F. S.). An example of tax exempt securities appears to be found in the provisions of §349.13, F. S., the Jacksonville Expressway Authority Law, which provides in part that "the bonds issued by the Authority, their transfer and the income therefrom, (including any profits made on the sale thereof) shall at all times be free from taxation of any kind by the state, or by any political subdivision, or taxing agency or instrumentality thereof," and the provisions of §423.03, F. S., which provide that "the debentures of a housing authority, together with interest thereon and income therefrom, shall be exempt from all taxes."

It would, therefore, appear that the tax exempt bonds and

securities, as above described, whether held by an individual or by trust, would be exempt from the provisions of Ch. 199, F. S. It appears further that the certificates to be issued as herein contemplated as fractional undivided interest in a unit investment trust fund created pursuant to the provisions of §§3 and 4(c) of the Investment Company Act of 1940, are not considered as being in a trust entity, as such, but rather are considered by definition of the governing statute as an interest in the proposed trust, "represents an undivided interest in a unit of specified securities." In other words, an interest in the proposed trust represents an undivided interest in the tax exempt municipal bonds composing the trust corpus.

From the information furnished us, it appears that the internal revenue service has concluded, pertaining to a unit investment trust similar to the sample copy presented to us for review, that the owners of the beneficial interest (the certificate holders) of a municipal investment trust, such as the proposed trust, are the owners of a pro rata portion of the trust under §676(a) of the Internal Revenue Code of 1954, which reads as follows:

(a) General Rule—The grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner under any provisions of this part, where at the time the power to revest in the grantor title to such portion is exercisable by the grantor or a non adverse party, or both.

It appearing that the very governing statement under which the proposed unit investment trust is to be created, together with the proposed trust agreement itself, define the interest of the certificate holders in the trust as fractional undivided interests in the bonds composing the trust corpus, and, in light of the fact that the corpus of the proposed unit investment trust is to be composed of only tax-exempt Florida municipal bonds and securities (that is, bonds and securities exempt from the provisions of Ch. 199, F. S.), and based upon the facts as hereinabove set forth, your question is answered in the affirmative.

Certificates (fractional undivided interest in the trust fund) held by Florida residents in a unit investment trust established under the Investment Company Act of 1940, and said trust holding only Florida nontaxable municipal securities, i. e., municipal securities which themselves are exempt from the provisions of Ch. 199, F. S., are excepted from the provisions of Ch. 199, F. S.

Your question is answered accordingly.

064-144—September 28, 1964

COURTS

COURT REPORTER'S CHARGES—INSOLVENT DEFENDANT §§29.02-29.04 AND 924.23, F. S.

To: *Joseph O. Macbeth, Assistant State Attorney, Sebring*

QUESTION:

Is the county required to pay a court reporter's charges when said court reporter's services are requested by the public defender, representing an indigent defendant, and the defendant is ultimately convicted?

This is in further response to your letter of recent date to which AGO 064-28 was directed. Said opinion is correct as applying to the fees paid a circuit court reporter for reporting arguments in a criminal case. However, because of certain inquiries made, I find it helpful to issue the following clarification of said opinion.

Inasmuch as the request for an opinion is made by you as assistant state attorney, it is assumed that this question involves a criminal proceeding in the circuit court. Furthermore, it is assumed that the defendant has been judicially declared insolvent, since he is represented by the public defender.

Sections 29.02 and 29.03, F. S., dealing with the duties of, and compensation to, official court reporters for circuit courts, provide as follows:

29.02 Duties of court reporter.—*The official court reporter shall, upon the request of the presiding judge, or that of the state attorney or defendant, report the testimony and proceedings, with objections made, the ruling of the court, the exceptions taken, and oral or written charges of the court in the trial of any criminal case in the circuit court, and the testimony in any preliminary hearing when so requested by the circuit judge or state attorney of that circuit, and shall report the testimony and proceedings with objections made, the rulings of the court, the exceptions taken, the trial of any civil case in said court upon the demand or request of the attorney for either party. (Emphasis supplied.)*

29.03 Compensation for services.—*The official circuit court reporter shall be entitled to receive for each day or fraction of a day in which such reporter shall be engaged in reporting testimony and proceedings in any civil case not less than ten dollars a day, nor less than ten dollars in any one case, for each day or fraction of a day in which such reporter shall be engaged; and said reporter shall also, when ordered by either party in a criminal case or by the presiding judge report the arguments of counsel arguing the facts to the jury, and shall receive as compensation therefor not less than ten dollars for reporting each such argument. Such reporter shall receive for each typewritten transcript of his notes of the testimony and proceedings taken at the trial of any civil or criminal cause, and furnished on demand of either party to the suit for which the testimony and proceedings are taken, the amount of fifty cents per page for the original and the amount of twenty-five cents per page for each carbon copy thereof; and each such transcript page shall consist of not less than twenty-five lines of double-spaced pica typing. Such reporter shall receive the same fees as provided in this section when rendering similar service in criminal or other courts of this state. There shall be no more official circuit court reporters in each judicial circuit than there are circuit judges therein. (Emphasis supplied.)*

Section 29.04 provides for an annual salary to be paid circuit court reporters; there are no other statutory provisions concerning compensation of circuit court reporters. It therefore appears that no compensation is to be paid a court reporter in circuit court for the reporting of "testimony and proceedings" in a criminal case (other than arguments of counsel), the compensation for report-

ing such "testimony and proceedings" being the salary provided in §29.04, F. S., (See AGO 059-119.) The compensation provided in §29.03 *concerning criminal cases* is limited to the reporting of "arguments of counsel arguing facts to the jury" by the court reporter. The court reporter's fees for reporting any such argument at the request of a defendant would be paid by the county when the defendant has been judicially declared insolvent.

Your attention is directed to the fact that the above comments do not relate to the transcribing of a court reporter's stenographic notes for appellate purposes. Under the provisions of §924.23, F. S., and Florida appellate rule 6.8, if an appealing defendant is adjudged insolvent, the county shall pay the cost of transcribing and filing copies of said stenographic notes. See also *Draper, et al. v. Washington*, 372 U.S. 487, 9 L.Ed. 2d 899, 83 S.Ct. 774, holding that equal protection of the law requires that a free transcript of record be provided an indigent defendant who has appealed his conviction.

In view of the authorities cited in AGO 064-28 and this modification, the circuit court reporter is entitled to compensation only when reporting the arguments of counsel in a criminal case, and in the event this takes place in a proceeding wherein the defendant has been declared insolvent, said charges should be paid by the county.

064-145—September 29, 1964

TAXATION

LICENSE TAXES—AMERICAN LEGION, LIABILITY—COIN OPERATED MACHINES—CH. 205, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are coin operated weighing machines owned and operated by the American Legion subject to occupational license taxes under Ch. 205, F. S.?

The American Legion is a nonprofit corporation chartered by Congress in 1919 by the act of Sept. 16, 1919 (41 Stat. 284) and amended by subsequent acts of congress, as will more fully appear by reference to §§41-51, tit. 36, U.S.C. It is provided in and by §43, tit. 36, of the said U.S.C. that "the purpose of this corporation shall be: To uphold and defend the Constitution of the United States of America; to promote peace and good will among the people of the United States and all the nations of the earth; to preserve the memories and incidents of the two World Wars fought to uphold democracy; to cement the ties and comradeship born of service; and to consecrate the efforts of its members to mutual helpfulness and service to their country." It is also declared in §46 of said tit. 36 that "the organization shall be nonpolitical and, as an organization, shall not promote the candidacy of any person seeking public office."

"A corporation created by the federal government is exempt from state taxation only if it is employed as an instrumentality for the exercise of the government's powers, and if such taxation would hinder such functions." (84 C.J.S. 405, §211). "The general rule is that it is not within the power of a state or municipality, except

by congressional or governmental consent or waiver, and within the limits prescribed by Congress, to lay a tax on the instruments, means or agencies provided or selected by the United States Government to enable it to carry into execution its legitimate powers and functions, or the property of such agencies . . ." (84 C.J.S. 393 and 394, §207). "There can be no taxation of a national bank by a state without the consent of the federal government" (10 Am. Jur. 2d 39, §14). Such banking institutions are considered as federal instrumentalities. A state may not impose a license tax on a federal instrumentality. (33 Am. Jur. 334, §14). In the Legion Clubhouse case, (248 Wis. 380, 21 N.W.2d 668) a nonprofit corporation used in connection with an American Legion, under the federal act, it is indicated that if the clubhouse had been owned by the American Legion instead of the said Legion Clubhouse, it would have been entitled to tax exemption; however, it was held subject to taxation as not belonging to the American Legion.

The powers granted the American legion by §§41-51, tit. 36, U.S.C., include the "power to receive, hold, own, use and dispose of such real estate and personal property as shall be necessary for its corporate purposes; to adopt a corporate seal and alter the same at pleasure; to adopt a constitution, by laws, and regulations to carry out its purposes, not inconsistent with the laws of the United States or of any state; . . . to establish and maintain offices for the conduct of its business; to establish state and territorial organizations and local chapter or post organizations . . . and all such acts and things as may be necessary and proper in carrying into effect the purposes of the corporation." State and territorial organizations and local chapter or post organizations duly organized and established under and pursuant to said §§41-51, tit. 36, U.S.C., are deemed and considered to be a part of the American legion created and established as aforesaid. Nonprofit corporations and associations organized and established by members of an American legion as an agency for the purpose of holding title to real property do not appear to be a part of the legion post establishing it. (Legion Clubhouse v. City of Madison, 248 Wis. 380, 21 N.W.2d 668). To be entitled to tax exemption, property of an American legion post must be vested in the legion post organization or chapter, and not in some other corporate or other entity or association.

In the light of the purposes mentioned in §43, tit. 36, U.S.C., above-quoted, and their relation to the United States and the world wars therein mentioned, we are of the view that the American legion, if authorized under said §§41-51, tit. 36, U.S.C., is an instrumentality of the United States, not subject to taxation, including license taxes, there being no congressional authority for such taxation, so long as the property is used exclusively for the purposes mentioned in the federal statute.

Your above-stated question is answered in the negative, so long as such weighing machines and the funds produced therefrom are used exclusively for the purposes mentioned in said §§41-51, tit. 36, U.S.C.

064-146—September 30, 1964

FALSE ADVERTISING

APPLICATION OF CH. 500 AND §817.42, F. S., TO LABELING
ON FOOD AND DRUGS—§§500.03(10), (12), 500.04
AND 500.24, F. S.*To: Richard E. Gerstein, State Attorney, Miami*

QUESTIONS:

1. Do the provisions of Ch. 500 F. S. as regards false or misleading advertising or false and misleading labeling of food and drug articles remove such items from operation of §817.42, F. S.?

2. Does price advertising on labels and containers of food and drug articles declaring such item to be a stated number of cents off the 'regular price' (which is not stated) remove such advertising from §817.42 F. S., in that neither a former nor comparative price is stated therein?

AS TO QUESTION 1:

Chapter 500, F. S., relates to food, drugs and cosmetics, and since 1939, the statute which is now §500.04, F. S., has contained the following provisions:

The following acts and the causing thereof within the state are prohibited:

* * *

(5) The dissemination of any false advertisement.

Also, since 1939, what is now §500.24, F. S., has made it a misdemeanor for a person to violate the above-quoted provisions of what is now §500.04, F. S.

Section 817.42, F. S., enacted in 1959, provides as follows:

817.42 Advertising former or comparative prices.—No price shall be advertised as a former or comparative price of the thing advertised unless the alleged former price was the prevailing price for not less than thirty consecutive days within the four months next immediately preceding the date of the advertisement, or unless the date when the alleged former price did prevail is clearly and conspicuously stated in the advertisement, and on any price listing otherwise used, which must be available to customers and police officers.

It will be noted that whereas §500.04, F. S., merely forbids, in general terms, the dissemination of any false advertisement, §817.42, F. S., is aimed at a specific, limited type of advertising, that is to say, the advertising of a price as a former or comparative price except under stated conditions, even though the price advertised may actually be a former or comparative price and even though the advertisement thereof may not be false.

Moreover, §817.42, F. S., is the later enactment and represents the last and controlling expression of legislative intent with respect to the type of advertisement of food and drug products which is prohibited thereby.

Next to consider the question of false and misleading labeling. For the purposes of Ch. 500, F. S., the term "labeling" includes all labels and other written, printed or graphic matters upon an

article or any of its containers or wrappers (§500.03(10), F. S.) and an "advertisement" does not include representations disseminated by labeling (§500.03(12), F. S.).

Therefore, it appears that Ch. 500, F. S., does not pertain to any kind of advertisement on a food or drug product label.

Further, §817.42, F. S., is the much later expression of the legislative will and, as such, is not affected by the earlier enacted Ch. 500, F. S.

In my opinion, your first question is properly answered in the negative.

AS TO QUESTION 2:

As I understand from your statement of this question, the following printed or written matter appearing on the label or container of a food or drug product would be typical of the kind of advertisement inquired about, to wit:

"37¢ off regular price"

In order to come within §817.42, F. S., a "former" price must be advertised. This is so because, although said section begins by prohibiting the advertisement of a price as a "former or comparative" price of the thing advertised, except under stated conditions, it is clear from the next succeeding words of the statute that the comparative price thus referred to is a former price as distinguished from a current price. These succeeding words are: "... unless the alleged *former price* was the prevailing price for not less than thirty consecutive days within the four months next immediately preceding the date of the advertisement, or unless the date when the alleged *former price* did prevail is clearly and conspicuously stated in the advertisement . . ." (Emphasis supplied.)

Do the words "regular price" referred to in your statement of question 2 necessarily mean the same thing as "former price"? I think not. To me, the words "regular price" are ambiguous. They are susceptible to more than one interpretation. They could readily be understood to mean the price currently being charged by merchants in the community or trade area. They could also be understood to mean the former price at which the advertiser has been selling the advertised product. Since the words "regular price" do not necessarily mean the same thing as "former price," and since the supreme court of Florida has said that nothing is to be regarded as within the meaning of a criminal statute that is not within its letter and its spirit (*City of Leesburg v. Ware*, 153 So.87; *Watson v. Stone*, 4 So.2d 700), and that an accused must be plainly and unmistakably within a statute in order to justify his conviction (*Watson v. Stone*, supra), it is my opinion that an advertisement on labels or containers of food or drug products or other goods, wares or merchandise stating that the price advertised is a stated number of cents "off regular price" should not be construed to be a violation of said §817.42, F. S.

Question 2 is answered accordingly.

064-147—September 30, 1964

ELECTORS AND ELECTIONS

REGISTRATION OF PERSONS RESIDING ON MILITARY
RESERVATIONS—§1, ART. VI, STATE CONST.;
§§97.041, 97.051, AND 222.17, F. S.

To: Robert A. Mallard, Supervisor of Registration, Jacksonville
QUESTION:

Is a person who is otherwise qualified and who has lived on a government reservation in Florida for at least one year capable of establishing such residence as would entitle him to be registered to vote in this state?

Section 1, Art. VI, of the state constitution and §97.041, F. S., provide in substance that for a person to be eligible to register to vote in Florida he must be "a permanent resident living in Florida for one year, residing in the county where he wishes to register for six months." Under the provisions of §97.051, F. S., an applicant must make a statement to this effect under oath as to his eligibility as an elector.

Because it is of historical interest it should be pointed out that on Aug. 13, 1952, the attorney general of Florida issued AGO 052-250, in which it was concluded that persons residing on lands over which Florida had ceded *exclusive* jurisdiction to the federal government were not eligible to qualify as residents of Florida for voting purposes. This opinion was based on traditional concepts as to jurisdiction which were universally accepted and was the prevailing view. It must be pointed out, however, that in AGO 052-250, *supra*, there was an assumption that the federal government exercised exclusive jurisdiction and no independent inquiry was made as to the development of actual jurisdiction of the state over these lands.

Since the attorney general's ruling of some 12 years ago was the latest legal pronouncement in Florida on this subject and there was no statutory direction or Florida case authority on point, the supervisors of registration had no other alternative but to adhere to this legal guide.

The general rule in the United States has been that when the federal government under authority of congress, exercises exclusive jurisdiction or legislation over a tract of land situated within the state for any of the purposes mentioned in the provisions of the federal constitution and such exercise of exclusive legislation by congress is consented to by the state a resident of such a tract of land is not deemed a resident of the state with authority to vote at state elections. See Annotation at 142 A.L.R. 433, citing *State ex rel Parker v. Corcoran*, 128 P.2d 999; *Herken v. Glynn*, 101 P.2d 946; *Arledge v. Mabry*, 197 P.2d 884, and *Johnson v. Morrill*, 126 P.2d 873. Other authorities which so held may be found at *McCrary on Elections*, §89, p. 68; *Paine on Elections*, §65, p. 44; *Kennan on Residence and Domicile*, §493, p. 844; 58 *Yale Law Journal*, 1402; 101 *Pa. Law Review* at 124; 18 *Am. Jur.* §66; and 29 *C.J.S.* 49, *Elections*, §25.

It was generally believed in 1952 and thereafter that Florida had ceded exclusive jurisdiction over most if not all military installations in Florida and thus the supervisors of registration in Florida declined to register persons whose only residence in Florida was

on a military or government reservation in light of the attorney general's holding.

A more thorough study reveals that over the years Florida has been the site of an increasing number of military and defense installations. A research of the Deeds of Cession and other records indicates that in some cases Florida has ceded exclusive jurisdiction to some of the installations and has not to others. To add to the confusion it appears in some situations that exclusive jurisdiction over a portion of a reservation was ceded to the federal government while it was retained by the state on other portions. An example is Homestead air force base in Dade county where exclusive jurisdiction was never ceded to the federal government and Mayport naval station in Duval county where those living on one portion of the base could claim legal residence in the state but pursuant to the attorney general's opinion of 1952, others were refused the right to register and vote because they resided in a portion where exclusive jurisdiction had been ceded to the federal government. This presented a checkerboard of jurisdictional inconsistencies and was among the facts taken into consideration in reviewing this problem.

Since the issuance of AGO 052-250, *supra*, wherein it was assumed that exclusive federal jurisdiction existed over all military reservations in Florida, a majority of the courts which have considered this question have taken into consideration the changes in both state and federal laws pertaining to federally ceded lands situated within the state. See *Royer, et al, v. Board of Election Supervisors for Cecil County*, 231 Md. 561, 191 Atl.2d 446, cert. denied U.S. S.Ct. 375, U.S. 921, 11 L.Ed.2d 165, 84 S.Ct. 267; *Rothfels v. Southworth*, 11 Utah 2d 169, 356 P.2d 612; *Adams, et al, v. Londeree, et al*, 139 W.Va. 748, 83 S.E.2d 127. It is these authorities which have promoted a review of the application of the conclusion reached in AGO 052-250, *supra*.

The first case which considered these changes in this area of law is found in *Arapajolu, et al, v. McMenamin*, 113 Cal. App. 2d 824, 249 P.2d 318, 34 A.L.R.2d 1185. The court concluded there that because the power to collect taxes depends upon the existence of state jurisdiction over federal lands the congress had made certain recessions to the states in the terms of jurisdiction. In that case the court at 249 P.2d 321, recognized that the federal government had codified in 40 U.S.C.A. §290, provisions of the workmen's compensation laws which extend to "all lands and premises owned or held by the United States of America . . . which is within the exterior boundaries of any state, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the state . . ." The court further pointed out at 249 P.2d 322 of its opinion, "In like fashion the Congress has receded and returned to the States jurisdiction over federal lands within their borders to enforce State unemployment insurance acts therein, 26 U.S.C.A. §1606(d); to tax motor fuels sold therein, 4 U.S.C.A. §104; to levy and collect sales and use taxes therein, 4 U.S.C.A. §105; and to levy and collect State income taxes therein, 4 U.S.C.A. §106." (4 U.S.C.A., §§104-110, are commonly referred to as the Buck act.)

After reciting these federal statutory provisions in which the congress had receded and returned to the states jurisdiction over certain matters within federal lands ceded by the states, the court went on to say, "It is clear that the Congress had receded to the

States jurisdiction in substantial particulars over federal land over which the United States previously had exclusive jurisdiction. It may no longer be said of those lands that they are, as said by the Ohio Court in *Sinks v. Reese*, (19 Ohio St. 306) 'as foreign to Ohio (California) as is the State of Indiana or Kentucky, or the District of Columbia.'" It was on the basis of these congressional acts in which the congress returned to the states certain jurisdiction over federal lands that the court concluded that the federal government no longer retained exclusive jurisdiction over its reservations within the state.

In distinguishing the long line of precedents, some of which were cited in AGO 052-250, *supra*, the Cal. court said at 249 P.2d 323, "All of the election cases cited above, except *Arledge v. Mabry*, *supra*, 197 P.2d 884, in which residents on federal lands were held not to be residents of the State so as to qualify them to vote were decided at a time when the United States did have and exercise exclusive jurisdiction over those lands, and while *Arledge v. Mabry* was decided after the recessions of jurisdiction above set out, the court in that case did not consider their effect but assumed that the United States still had and exercised exclusive jurisdiction." Thus, the court concluded, "The jurisdiction over these lands is no longer full or complete or exclusive. A substantial portion of such jurisdiction now resides in the States and such territory can no longer be said with any support in logic to be foreign to California or outside of California or without the jurisdiction of California or within the exclusive jurisdiction of the United States. It is our conclusion that since the State of California now has jurisdiction over the areas in question in the substantial particulars above noted, residence in such areas is residence within the State of California, entitling such residents to the right to vote. . ."

In April 1954, the supreme court of appeals, the state's highest court in *Adams, et al, v. Londeree, et al*, 139 W.Va. 748, 83 S.E.2d 127, cited the Cal. district court of appeal's decision with approval. The W.Va. court likewise recognized the many congressional acts such as the Buck act and the others cited in the Cal. case in which the federal government had returned substantial jurisdiction to the states.

In *Rothfels v. Southworth*, 11 Utah 2d 169, 356 P.2d 612, a decision by the supreme court of Utah, the state's highest court, decided Oct., 1960, cites the *Arapajolu* case "as well reasoned and correct" and concluded that persons living on Indian and military reservations were entitled to vote making reference to a recently enacted state statute which removed the impediments which deprived these persons the right to vote in Utah.

In recent discussions concerning this matter the courts in *Schwartz v. O'Hara T. P. School*, 375 Pa. 440, 100 Atl.2d 621, and in *Royer, et al, v. Board of Election Supervisors for Cecil County*, 231 Md. 561, 191 Atl.2d 446, discussed this question but it was considered not in point as the taxing authorities and practices as outlined in the opinions were not clear so as to allow a valid comparison with Florida practices and are distinguishable on that basis.

The writer is not unmindful of the Florida supreme court's decision in *International Business Machine Corp. v. Vaughn, Fla.*, 98 So.2d 747, wherein the Florida supreme court concluded that certain electronic accounting machines owned and used exclusively by the U.S. air force at Eglin air force base were not subject to taxation by Okaloosa county since said machines were situated on

a government reservation over which Florida had ceded to the United States of America exclusive jurisdiction. This case, however, is readily distinguishable upon the facts as it related to the issue of taxation rather than residency.

It should be borne in mind the authorities of Florida in adopting this position are making a good faith effort to permit those persons residing on government reservations who are bona fide residents of Florida to register to vote. It should be pointed out as was done in AGO 064-39, that "The Courts of this state have established the rule that a person in the military service of the United States coming into this state under military orders and remaining in this state under such orders will not, of his presence in the state *alone*, become a citizen or resident of the state, . . . However, the fact that a person may be under military orders will not prevent him from becoming a citizen domiciled in Florida where the facts and circumstances are such as will overcome the presumption above mentioned (11 Fla. Jur. 20, §25; Campbell v. Campbell, Fla., 57 So.2d 34). Where a person of another state including military personnel comes into this state and by clear and positive evidence establishes his permanent domicile in this state there arises the presumption that such permanent domicile remains in this state until legally established elsewhere."

In an effort to assist the various registration officers of this state in implementing this opinion, legal officers of the military installations in the area from which this request came volunteered to assist in screening those military personnel who reside on the government reservation to insure that those who attempt to register are bona fide residents of Florida. It is hoped that the legal officers of other military installations throughout this state will be equally agreeable. The courts of Florida have held that the best proof of one's legal domicile or residence is his own statement as to "where he says it is," Ogden v. Ogden, 159 Fla. 604, 33 So.2d 870, at 873; Pawley v. Pawley, Fla., 46 So.2d 464, 28 A.L.R.2d 1358; Frank v. Frank, Fla., 75 So.2d 282, at 286. However, when the statements of the individual are contradictory or inconsistent with the facts or are otherwise subject to doubt, then the supervisors of registration would be privileged to look to the previous outward manifestations of the applicant. In so doing the supervisor may inquire of the applicant as to his present voting status. Where an applicant admits he voted in another state within the year preceding the forthcoming election, he may be denied the opportunity to register in Florida. See §104.181, F. S., and AGO 053-68.

There are other things that a supervisor of registration may consider in an effort to determine the validity of one's verbal affirmation that he is a resident of Florida. Such things would include the previous filing of a manifestation of domicile as is provided for in §222.17, F. S. Additional criteria to be considered are home ownership, family residence, residence or location of the wife and children, purchase of auto tags, driver's licenses, payment of state and county real or personal property taxes, statements in marriage certificates, court records, tax records, military service records, affidavits of residence or nonresidence filed with appropriate clerks, vital statistics information, the district director with whom recent personal income tax returns have been filed, cancellation of previous voting records, statements on applications for life and auto insurance, the location of a part-time business, profession or trade, location of business enterprise entered into by

other members of the family, membership in various lodges, clubs, church affiliation, the purchase of a burial plot, the sale or acquisition of a home, location of a bank account, location of a safe-deposit box, the filing of a will, the cancellation of credit accounts or other ties in cities or states of previous residence, are all suitable outward manifestations indicating a person's intent with regard to his permanent place of residence. Generally, no two cases will be exactly alike and each must be judged on its own merits. In each case, however, there must be the requisite continuous physical presence in Florida coupled with the requisite positive intent to establish Florida as a residence at least 1 year prior to the registration in Florida and 6 months prior to the registration in the county.

It should be borne in mind that temporary absence will not defeat a person's intent to make Florida his permanent place of residence. *Bloomfield v. City of St. Petersburg Beach, Fla.*, 82 So.2d 364, 11 Fla. Jur. 12, Residence and Domicile, §14, AGO 054-38, and thus a person who moved to Florida a year or more ago, then intending to make Florida his permanent place of residence who was sent abroad on a temporary duty mission should not at the end of a year's time be precluded from the privilege of registering.

In summary and conclusion several thoughts should be left with the reader:

First, the reasons for following the view which permits those persons residing on military reservations to establish residence in the state for voting purposes are compelling. One of the highest privileges of an American citizen is his right to vote. No citizen should be disfranchised on technical grounds or based upon a legal fiction which cannot be substantiated in fact. "All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor. Where the elective franchise is regulated by statute, the regulation should, when and where possible, be so construed as to insure rather than defeat the exercise of the right of suffrage. Technicalities should not be used to make the right of the voter insecure." (See 29 C.J.S. 27, Elections, §7, citing *State ex rel Whitley v. Rinehart*, 140 Fla. 645, 192 So.819. See also 18 Am. Jur. 188, Elections, §11.)

It had been assumed that where a Deed of Cession has been conveyed to the United States of America by Florida, exclusive jurisdiction would lie but an examination of the facts and of the laws of the United States and Florida indicates that such no longer exists. A great portion of the jurisdiction which was formerly thought of as being full and complete or exclusive in the federal government now resides in the states and that the military reservations lying within the state can no longer be considered as an island or pocket fenced in by this legal fiction.

As pointed out earlier, state jurisdiction now extends into many areas upon lands where exclusive jurisdiction has been ceded to the federal government. The operation of workmen's compensation and unemployment compensation laws has been extended to this area. Congress has returned to the states jurisdiction to tax motor fuels sold on ceded reservations, to levy and collect sales and use taxes and levy and collect state income taxes therein. Florida is presently collecting certain alcoholic beverage, motor fuel and tobacco taxes on military reservations.

In addition, the legislature of Florida in enacting §46.12, F. S., announced it to be the public policy of this state that mili-

tary people residing within Florida should have the right to be considered residents for the purpose of maintaining suits in chancery or actions at law which in effect allows these persons to maintain divorce actions and participate in adoption matters, etc., which they would not be able to do if they were not presumed by operation of this statute to be residents of the state, since the federal courts have no jurisdiction in divorce or adoption matters. From this and the other authorities cited above, it must follow that these persons who reside on government reservations should also be extended the privilege of registering to vote in this state, *if* they are bona fide permanent residents of Florida, who can meet the other requirements of the election laws as set out in §1, Art. VI, State Const., and §97.041, F. S.

Secondly, it should be pointed out in conclusion that this holding does not overrule the conclusion reached in AGO 052-250, *supra*, to the effect that persons would not be eligible to register to vote in Florida if they resided on a reservation over which the federal government has exclusive jurisdiction or legislation. This reevaluation of the situation merely concludes that under the present circumstances the federal government no longer has for the reasons amplified above, *exclusive* jurisdiction over those areas ceded to the federal government for military and defense purposes situated in Florida.

Thirdly and finally, it is concluded that your question as set out above is answered in the affirmative conditioned upon the assumption that those persons attempting to register meet the residency requirements of Florida and can meet every other requirement of the Florida constitution and statutes applicable to those seeking to vote in this state.

064-148—October 1, 1964

INSURANCE

PRE-NEED BURIAL CONTRACTS—SALE OF VAULTS AS COMING WITHIN PURVIEW OF CH. 639, F. S.— §§639.07(2), 559.30-559.47, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

STATEMENT OF FACT:

I have reviewed the recent letter addressed to your office by an attorney representing a client who operates a cemetery located in this state and is desirous of selling burial vaults on a pre-need basis; that is to say, the vaults are not to be delivered until demand by the purchaser. I further presume that the demand referred to in the attorney's letter is contemplated to be made concurrent with the need for such vault in the performance of a funeral service for the purchaser.

QUESTION:

Is the sale of a burial vault by any person, including a cemetery operator, the sale of burial supplies and equipment within the meaning of Ch. 639, F. S., where such sale is entered into on a pre-need contract basis?

Chapter 639, F. S., was amended by the state legislature for the purpose of regulating persons engaged in entering into pre-need burial contracts as defined by §639.07(2), F. S. Said section defines a "pre-need burial contract" to mean:

Any contract, other than a contract of insurance, under which, for a specified consideration paid in advance in lump sum or by installments, a person promises, upon the death of a beneficiary named or implied in the contract, to furnish funeral services or burial supplies and equipment.

Under other provisions of said chapter, no person is permitted to engage in the above-described activities unless such person has obtained a certificate of authority in accordance with the provisions of the subject chapter. Included among such provisions is the requirement that a designated portion of all moneys paid on such contract is required to be kept in escrow.

While the principal business of the attorney's client seems to be the ownership and operation of a cemetery company and said company is presumably licensed under the Florida cemetery act as provided by §§559.30-559.47, F. S., it would seem that the activity desired to be engaged in goes beyond the acts regulated by said §§559.30-555.47. The burial vaults sought to be sold are a burial supply which appears to come within the purview of the definition of "pre-need burial contract" as contained in §639.07(2), F. S.

In arriving at the foregoing conclusions, I am assuming that the vault proposed to be sold on a pre-need basis is an item of personalty, not having been permanently affixed to the ground so as to become a part thereof in the sense of real property vis-a-vis personal property.

Accordingly, a person may not engage in the sale of burial supplies, including vaults as above-described, on a pre-need basis without first having complied with the provisions of Ch. 639, F. S., and obtaining a certificate of authority to so engage from the state insurance commissioner in accordance with the provisions of said chapter.

In view of the above and foregoing, the question propounded is answered in the affirmative.

064-149—October 1, 1964

COUNTY PROPERTY

OIL AND MINERAL LEASES—§§125.35, 125.36, 253.51,
ET SEQ., 377.02, 377.18-377.40, F. S.

To: *James R. Adams, County Attorney, Naples*

STATEMENT OF FACT:

Certain land in Collier County was deeded to the county by the Federal aviation administration, with restrictive clauses requiring that the county make no use of the land or grant no interest inconsistent with airport uses unless the Federal aviation commission consents thereto; that the county wishes to lease this airport property to private interests for oil and gas purposes; that the Federal aviation administration has consented to such lease providing no drilling is done on the property.

QUESTIONS:

1. Does the county have authority by virtue of §§125.35 and 125.36, F. S., to enter into an oil and gas lease with a private company?

2. If the answer to question 1 is in the affirmative,

(a) May the county legally proceed under the procedure set out in §§253.51, et seq.?

(b) Must the county legally proceed under the procedure set out in §§253.51, et seq.?

3. Do the provisions of §377.02 apply to the proposed leasing?

In an opinion by my predecessor, AGO 052-155, it is stated that §§125.35 and 125.36, F. S., authorize boards of county commissioners to sell and convey any real or personal property owned by the county not needed for county purposes, whenever the board concerned determines it is for the best interest of the county to do so, and that since a lease conveys an interest in land it is reasonable to assume that these statutes would include a lease within its terms. The opinion cited *DeVore v. Lee*, 158 Fla. 608, 30 So.2d 924, as holding that a lease is a conveyance by the owner of an estate of his interest therein for a term less than his own and that it passes a present interest in land.

Following the reasoning in that opinion, a subsequent attorney general's opinion 057-76, added that the board of county commissioners must first determine that it is in the best interest of the county to enter into a proposed lease, and must factually establish that the property is not needed for county purposes, as per §125.36, F. S.

Quoting further from AGO 057-76: "Since we concluded in Opinion 052-155 . . . that the power to sell included the authority to lease county property under the same circumstances, it would seem to logically follow that if the board of county commissioners may divest the county of its entire interest in property by the sale thereof, it might enter into a contract of lease for a period of years extending beyond their respective terms of office. However, any lease must necessarily be subject to the rule of reasonableness as to its provisions and the terms thereof."

If the lease proposed by the Collier county commission with Sun Oil Co. is for the oil and gas only, then that is personal property and under the requirements of §125.35, F. S., such a lease would not have to be advertised and sold to the highest bidder. However, if the lease would convey a leasehold interest in the land itself, then such a lease would require advertising and bidding by §125.35, F. S. Section 253.51, F. S., is restricted to the sale of leases by the trustees of the internal improvement fund or other *state* agency owning land. This does not, by the plain wording of the section, apply to county-owned land.

AS TO QUESTION 1:

This question is answered in the affirmative.

AS TO QUESTIONS 2(a) and (b):

These questions are answered in the negative.

AS TO QUESTION 3:

Section 377.02, F. S., concerns the interstate compact to conserve oil and gas to which Florida is a party. This and the other signatory states involved in this compact are bound to accomplish, within reasonable limits, the prevention of:

(a) The operation of any oil well with an inefficient gas-oil ratio.

(b) The drowning with water of any stratum capable of producing oil or gas, or both oil and gas in paying quantities.

(c) The avoidable escape into the open air or the wasteful burning of gas from a natural gas well.

(d) The creation of unnecessary fire hazards.

(e) The drilling, equipping, locating, spacing or operating of a well or wells so as to bring about physical waste of oil or gas or loss in the ultimate recovery thereof.

(f) The inefficient, excessive or improper use of the reservoir energy in producing any well.

The provisions of the interstate compact to carry out the above objectives are contained in §§377.19-377.40, F. S.

Section 377.18, F. S., states:

All common sources of supply of oil and gas or either of them shall have the production therefrom controlled or regulated in accordance with the provisions of this law.

Section 377.02, F. S., simply recites the original terms of the interstate compact, while Florida law carrying such provisions into effect follow §377.02, F. S. Their terms would apply to the lessee if and when production of oil and gas begins on lands covered by your proposed lease, or adjoining lands.

064-150—October 2, 1964

LEGAL NOTICES

QUALIFICATION OF NEWSPAPER—ENTRY AS SECOND CLASS MAIL—§49.03, F. S.

To: *W. L. Hendry, County Attorney, Okeechobee*

STATEMENT OF FACT:

A newspaper in Okeechobee began publishing there in September, 1963, and at that time applied for second class mailing privileges. It has published each week since that time, and has mailed regularly through the post office. In June the post office department issued this newspaper a second class mailing permit with an effective date of September, 1963.

QUESTION:

Must the second class mailing permit thus issued be held for a period of 1 year, in order for the publication to be eligible to carry legal notices, or is the publication eligible for such publication in September, 1964?

Newspapers in which legal notices and process may be published are defined in §49.03, F. S., and on the point here involved it states:

No notice or publication required to be published in a newspaper . . . shall be deemed to have been published in accordance with the statutes providing for such publication, unless the same shall have been published for the prescribed period of time required for such publication, in a newspaper which at the time of such publication shall have been continuously published at least once each week and shall have been entered as second class mail matter at a post office in the county where published for a period of one year next preceding the first insertion of such publication,

Section 4352 of the U.S.C. describes "enter" as follows:

(a) Upon application in the form prescribed by him, the Postmaster General shall enter as second class mail, at

the Post Office where the office of publication is maintained, any publication which is entitled under sections 4353-4357 of this title to be classified as second class mail.

The newspaper as described would otherwise qualify for second class mailing privileges.

This newspaper had been entered as second class matter since September, 1963, and therefore by September, 1964, had qualified to carry legal notices in this respect. You state the newspaper has published continuously once a week since it began in September, 1963. Therefore I conclude that this is a legal newspaper, having published as required, and having been entered as second class matter for a year as required.

On this same subject, you may be interested in AGO 041-38, copy of which is enclosed.

064-151—October 7, 1964

TAXATION

RECONVENING OF TAX EQUALIZATION BOARD AFTER ADJOURNMENT AS SUCH BOARD—CH. 10040, 1925, LAWS OF FLORIDA; §192.21, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May a board of county commissioners, sitting as a board of tax equalization, in determining the proposed assessed valuation of property, reconvene after adjournment to correct errors made by them during this equalization session?

In *Sparkman v. State*, 71 Fla. 210, 71 So. 34, text 41, the supreme court of Florida said that "the county commissioners have no general power as is specifically conferred by statute to secure equalization of tax values. When that power, as specially conferred, is exercised, and final adjournment is taken, their special power as a board of equalization ceases." Although no further reference to the above-quoted language appears to have been made by the said court, the court's opinion, in connection with tax equalization, was cited with approval in *Sanders v. Crapps*, Fla., 45 So.2d 484, text 488, and in *Sanders v. State*, Fla. 46 So.2d. In this case the board of county commissioners, sitting as a board of tax equalization, adjourned sine die and closed their equalization meeting. However, upon application of the taxpayer or otherwise, the said board reconvened and took further action concerning one item of taxation on the tax roll, changing the valuation of a parcel or property after having adjourned sine die as aforesaid, concerning which action the court said that "the special and limited power to equalize assessments having been exercised, and the duty completed, the statutes do not either expressly or impliedly give authority to have a subsequent meeting to change assessments fixed in due course of law." This case was decided in 1916.

Although Ch. 10040, 1925, now appearing with amendments, extensions, etc., as §192.21, F. S., made material changes in the taxing laws of Florida, there appears nothing in said section or otherwise that would seem to change the above-mentioned rule as to the effect of an adjournment sine die, except the provision that

"no act of omission or commission on the part of any tax assessor, or any assistant tax assessor, or any tax collector, or any board of county commissioners . . . shall operate to defeat the payment of said taxes; but any such act of omission or commission may be corrected at any time by the officer or party responsible for the same . . ." Where there has been an adjournment sine die of the board of tax equalization it would seem to be without jurisdiction to make further equalization of taxes except where there have been errors of omission or commission within the purview of said §192.21, F. S. This poses the questions of, *first*, has the board of tax equalization adjourned sine die, and, *second*, if so, has there been an error of omission or commission on the part of the board of tax equalization.

At the close of its Aug. 25, 1964 meeting the board of tax equalization made or caused to be made the following entry in its minutes, "there being no further business before the board, sitting as the board of equalization, upon motion duly made, seconded and carried, the meeting of the board of tax equalization adjourned." Although this minute entry might well be construed as an adjournment sine die, whether it was or was not, would appear to be dependent upon the intention of the board when it adjourned its Aug. 25, 1964 meeting. Notwithstanding said adjournment of the Aug. 25, 1964 meeting the said board reconvened as a board of equalization, on Sept. 1, 1964, on which day their minutes show the equalization of the assessment of certain properties, the board in its minutes of Sept. 1, 1964, having recited that it had committed an error when it adjourned its Aug. 25, 1964 meeting. It appears from the board's meeting Sept. 1, 1964 that its attorney advised it that it "may reconvene after adjournment to correct manifest error." With this we agree when the error is one of omission or commission.

Boards of county commissioners, sitting as boards of tax equalization, in determining the proposed assessed valuations of property, may reconvene after adjournment to correct *errors of omission or commission* made by them during the equalization session, but not otherwise.

064-152—October 7, 1964

MOTOR VEHICLES

HIGHWAY SAFETY—TOWING REQUIREMENTS ON INTER-STATE HIGHWAYS IN FLORIDA—§§317.791(1) AND 339.30(1)(h), F. S.

To: H. N. Kirkman, Director, Department of Public Safety,
Tallahassee

QUESTION:

May one car tow another car by means of a towbar on interstate highways in Florida?

Your attention is most respectfully directed to §§317.791(1) and 339.30(1)(h), F. S., which are the only statutes on this particular subject:

317.791 *Towing requirements.*—

(1) When one vehicle is towing another vehicle the drawbar or other connection shall be of sufficient strength to pull all weight towed thereby and said drawbar or other

connection shall not exceed fifteen feet from one vehicle to the other except the connection between any two vehicles transporting poles, pipe, machinery or other objects of structural nature which cannot readily be dismembered. When one vehicle is towing another vehicle and the connection consists of a chain, rope, or cable, there shall be displayed upon such connection a white flag or cloth not less than twelve inches square.

339.30 *Unlawful use of limited access facilities; penalties.*—

(1) (h) To tow disabled vehicles on any expressway; provided that any vehicle disabled on an expressway may be towed to the nearest exit ramp and then to the surfaced streets.

In light of the above, it would appear one vehicle may tow another for the full length of our interstate highways, as long as the drawbar or towbar meets the statutory specifications, but towing of disabled vehicles is restricted to the towing to the nearest exit ramp.

064-153—October 16, 1964

MOTOR VEHICLES

DISABLED PERSONS—EXEMPTION FROM PAYMENT OF PARKING FEES—§317.01011, F. S.

To: Arch Livingston, Motor Vehicle Commissioner, Tallahassee

QUESTION:

Where a disabled person has qualified and has been issued a windshield sticker for his automobile by the motor vehicle commissioner under the provisions of §317.01011, F. S., is such person permitted to park his automobile having attached thereto the said windshield sticker in a metered parking space within a municipality without the payment of the usual fee charged by the municipality for such privilege?

Section 317.01011(1), F. S., defines a disabled person as any person who has suffered the amputation of one or both legs or who has suffered the loss of the use of one or both legs as a consequence of paralysis or other permanent disability. These disabled persons who are licensed to operate a motor vehicle in Florida have the right to apply to the tax collector of the county in which said disabled person applied for his automobile license plate, for an identification sticker reflecting the disability and providing the immunities as expressed in §317.01011(1), (2), F. S.

The immunities provided the disabled persons by §317.01011(1), (2), F. S., enacted in 1961, read as follows:

(1) No county, city, town or any agency thereof shall exact any fee for parking on the public streets or highways or in any metered parking space from any person who has suffered the amputation of one or both legs or who has suffered the loss of the use of one or both legs as a consequence of paralysis or other permanent disability and who is licensed to operate a motor vehicle in Florida.

(2) No penalty shall be imposed upon any such dis-

abled person for parking on such streets or highways or in such metered space for a longer period of time than other persons are permitted to park on such streets or highways or in such metered space; provided, persons not so disabled using the vehicle of a disabled person with a sticker for their own use shall not have the privileges of this section.

In light of the above provisions of Ch. 317, F. S., it is my opinion that those persons entitled to identification stickers as provided by Ch. 317, F. S., are entitled to park in metered parking spaces within a municipality without the payment of the usual fee charged by the municipality for such privilege.

064-154—October 23, 1964

CRIMINAL PROCEDURE

ARRESTS WITHOUT WARRANT BY MUNICIPAL POLICE OFFICER—§§849.09, 901.15; CH. 849, F. S.

To: *Charles Byron, City Prosecutor, Delray Beach*

QUESTION:

May a police officer (municipal) who has probable cause to believe that a suspect is guilty of promoting a lottery, in violation of §849.09, F. S., arrest without a warrant such party even though such officer is aware that the ultimate disposition of the case may well be made solely by the municipal court?

Section 901.15, F. S., provides that a peace officer may arrest without a warrant one who he has probable cause to believe had committed a felony. In AGO 052-268 this office, in citing the case of *Osborne v. State*, 100 So. 365, set out that a municipal police officer is a peace officer as such term is used in §901.15, F. S. It therefore is apparent that a municipal officer may ordinarily validly arrest if he has probable cause to believe that the arrestee has committed a felony.

Chapter 849, F. S., makes the promotion of a lottery a felony, and it therefore appears that the arrestee referred to in your letter is one suspected of the commission of a felony. The fact that such party is tried and convicted in the municipal court does not prohibit his being subsequently tried in the appropriate state criminal court for the commission of a felony (See AGO 059-43). The reason that a conviction in a municipal court does not preclude a trial in the appropriate criminal court is that the conviction at the municipal level is not a conviction for a crime, because such courts do not have criminal jurisdiction, even over misdemeanors. The supreme court of Florida has, as recently as 1960, in the case of *Boyd v. County of Dade*, 123 So.2d 323, held that municipal court proceedings for violation of municipal ordinances are not criminal proceedings.

In view of the above rationale, it appears that one who promotes a lottery in a municipality in violation of both the state lottery law, and the municipal ordinance against lotteries, is guilty of two separate offenses—one of which is criminal and the other of a character less than criminal. There is nothing to preclude the police officer from basing the arrest on the felony offense, even though the option to prosecute on the felony is never exercised. The acts

committed by the arrestee in causing the arrest constitute a felony even if there is no felony prosecution.

In summary I would answer your question as follows:

A police officer who has probable cause for believing that a suspect has committed a felony may arrest on authority of §901.15, F. S., even though the criminal prosecution for the commission of the felony does not follow, and such prosecution ends at the municipal level.

064-156—October 22, 1964

STATE AND COUNTY OFFICERS AND EMPLOYEES RETIREMENT SYSTEM

RETIREMENT STATUS OF EMPLOYEES OF JACKSONVILLE
PORT AUTHORITY—§§122.02, 122.19; CH. 122, F. S.; CHS.
22938 AND 23259, 1945, 63-1447, LAWS OF FLORIDA

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are the employees of the Jacksonville port authority, established by Ch. 63-1447, state or county officers and employees within the purview and intention of Ch. 122, F. S.?

The Jacksonville port authority was created and established "a body politic and corporate" by Ch. 63-1447, and is authorized to "exercise its jurisdiction, powers and duties within the territorial limits of Duval County." The said Jacksonville port authority board consists of 7 members, two ex officio members, consisting of one county commissioner and one city commissioner of the city of Jacksonville, and five members appointed from Duval county in the manner provided in §1 of said Ch. 63-1447.

The authority is given power, under §3 of said Ch. 63-1447, to "construct, establish and improve harbors within the county and to improve navigable waters within the county." Under subsection (17) said authority is empowered to "issue general obligation bonds or revenue bonds of the authority" which general obligation bonds are required to be "approved by a majority of the votes cast in an election in which a majority of the freeholders residing in Duval County who are qualified to vote in such election shall participate." Under §4 of said Ch. 63-1447, it is made "the duty of the Board of County Commissioners of Duval County to levy an annual tax on all taxable real and personal property in such county in an amount to be fixed by said Authority and certified to said board sufficient to meet the sinking fund requirement . . . (and) to levy an annual tax on all taxable real and personal property in the county . . . for the operating and administrative expenses of the authority . . ." It is further declared in said §4 that "the levy, collection and expenditure of such taxes is hereby declared to be a lawful county purpose."

Under §10 of said Ch. 63-1447, the city of Jacksonville, is required to transfer to the said Jacksonville port authority its municipal docks and terminals, and Duval county is required to transfer to the said port authority its Blount Island properties. The authority is by said §10 required to deliver to the city of Jacksonville its revenue bonds in the amount mentioned in said §10. The Jack-

sonville expressway authority statutes expressly declare it to be an "agency of the State of Florida"; however, we find no like or similar declaration in said Ch. 63-1447. Nowhere in said Ch. 63-1447 do we find any language declaring the Jacksonville port authority to be a taxing or other district or defining any area, other than Duval county, wherein it is to operate, so as to justify classifying the said port authority as a political or taxing district. The Jacksonville port authority may not be classified as an agency of the city of Jacksonville, or to function as a part or a department of said city. Under §122.02, F. S., the term county employees would seem to include all full time employees who receive compensation for services rendered from county funds or from any agency, branch, department, institution of a county "from funds from any source provided for their employment or service regardless of whether the same is paid by county warrant or not," when paid in terms of fixed monthly salaries. The Jacksonville port authority receives funds provided by ad valorem taxes imposed on real estate in Duval county. (§4, Ch. 63-1447)

We are, therefore, of the opinion and so hold that the Jacksonville port authority, created and established by Ch. 63-1447, is an agency, instrumentality or adjunct of Duval county, and functions for and serves the said county in its capacity as a subdivision of the state. This was evidenced by the legislature when it, by §4, Ch. 63-1447, provided for the imposing of ad valorem taxes against the taxable properties in Duval county for the use and benefit of said port authority.

This leads to the conclusion that the employees of the Jacksonville port authority are county employees within the purview and intent of Ch. 122, F. S., so that such employees, except for Ch. 23259, 1945, and the amendments, extensions and additions thereof and thereto, would be within the intent and purview of said Ch. 122, F. S. Said Ch. 23259, 1945, created and established the Duval county employees pension plan, a plan similar in intent and purpose to the state and county officers and employees retirement plan created and established by Ch. 122, F. S., but limited in its operation to the employees of Duval county.

Said Ch. 23259, 1945, creating and establishing the Duval county employees pension fund, appears to have become a law on May 1, 1945, and to have become effective on Oct. 1, 1945. Ch. 22938, 1945, creating and establishing the former county officers and employees retirement system, and which later was merged with the state officers and employees retirement system, to form the present state and county officers and employees retirement system, became a law on June 11, 1945, and became effective on July 1, 1945. Section 17 of said Ch. 22938, 1945, provided that the said chapter and act should not operate to repeal any other retirement system act enacted at the said 1945 regular session of the Florida legislature. Said §17 of Ch. 22938, together with a like provision in the former state officers and employees retirement system, were merged by the act consolidating the said state and county retirement systems, becoming present §122.19, F. S. It is evident from said §122.19 and the statutes and laws from which it was derived that the Florida legislature recognized the continued existence of the Duval county employees' pension fund. We find nothing in Ch. 63-1447, that mitigates against the continued existence and operation of the said Duval county pension fund, after its effective date. As to the employees transferred from county con-

trol to port authority control, the said port authority being a county agency or function, the said employees continued to be county employees within the purview and intention of Ch. 23259, 1945, and within the purview of said Ch. 22938, 1945. Blount Island employees of the county, we presume, were within the purview and operation of Ch. 23259, 1945, and its amendments, extensions and additions; if this presumption is correct, such employees continued to be county employees within the purview of said Ch. 23259, and its amendments, extensions and additions. It does not appear that their retirement or pension status was changed by reason of their transfer to the port authority.

Section 11 of said Ch. 63-1447, appears to spell out the retirement or pension status of the employees of the city of Jacksonville whose employment passed from the city to the port authority by action taken under and pursuant to said chapter.

In the light of the above and foregoing, we feel that the above-stated question should be answered, unless and until finally determined by the courts, in the negative.

064-157—October 22, 1964

RACING COMMISSION

JAI ALAI FRONTONS OPERATING DAYS—§§550.08, 551.04(1), 551.12, 551.15, F. S.; CH. 59-417, LAWS OF FLORIDA

To: *Frank Kappel, Supervisor of Racing, Miami*

QUESTION:

What is the maximum number of operating days that the racing commission may allot to jai alai frontons in this state?

The controlling provision of Florida law governing racing seasons for horse tracks, dog tracks, and jai alai frontons is to be found in §550.08, F. S., which states in pertinent part that:

No license shall be granted . . . for a meet or meeting in any county to extend longer than an aggregate of . . . ninety days for dog racing season in any racing season. Section 551.12, F. S., must be read in pari materia with the aforesaid statute. Section 551.12 states:

Provided, also, that the said commission shall not limit the number of operation days in any twelve-month period for such operations of licensed frontons to less than ninety days during the period extending from and including the first day of December in each year to and including the 10th day of April of the following year.

This provision has been construed by the supreme court as a limitation on the racing commission which assures frontons an operative season of 90 days during the specified period. *Volusia Jai Alai, Inc. v. McKay* (Fla.) 90 So.2d 334; *Volusia Jai Alai v. Ring* (Fla.), 122 So.2d 4.

Section 551.15, F. S., permits frontons within 35 miles of each other, at their option to operate during the summer. The statute specifically provides that where a fronton does choose to run in the summer the total of its summer and winter days shall not exceed one hundred. We are not here concerned with this provision in arriving at an answer to your query. It is cited only because it

contains the only section in Florida's racing law which provides for racing (or operating) days in excess of 90.

Although previous racing commissions beginning in 1954 have granted jai alai frontons 100 operating days, it is certain that there is no statutory basis for the additional 10 days beyond 90 (excluding, of course, charity and scholarship days). In *Volusia Jai Alai, Inc. v. McKay* (Fla.), 90 So.2d 334, after the supreme court had determined that \$550.08 quoted above applied to jai alai frontons as well as dog tracks, it said, in construing the racing days given Volusia jai alai:

... Under Section 550.08, Florida Statutes, ... the commission is inhibited from granting a license for dog racing for a term longer than 90 days in any season but is not precluded from shortening the time. *In view of the restriction, we are puzzled by the apparent action of the commission in issuing the permit involved in this case for 100 days.* . . (Emphasis supplied.)

Although the practice of granting 100 days arose through administrative ruling, and the question is alluded to in the above-mentioned case and in the second Volusia jai alai case, hereinafter discussed, the courts of this state have never sanctioned this practice. My predecessor in office alluded to the practice in AGO 059-140 dated July 10, 1959 p. 210:

It has long been the administrative ruling of the commission that a maximum of 100 days in any 12-month period may be granted to an applicant within this period of time, and that situation still holds true except in cases where certain fronton operators under a 1959 act, elect to use a portion of their operational days during the summer period.

(See also AGO 061-188, dated May 24, 1961.) The opinion here quoted dealt with Volusia jai alai, and since in other particulars it was adverse to the position adopted by them, suit was brought and the supreme court in *Volusia Jai Alai v. Ring, et al.* (Fla.), 122 So.2d 4, held that because of its location, Volusia Jai Alai was entitled to 90 days during the winter season and only those *summer* dates as the commission in its discretion wished to grant. In so doing the court reiterated more strongly than it had in the past that jai alai frontons could not run more than 90 days (plus charity and scholarship days). The court said at p. 6:

Since the original pari-mutuel act was passed in 1931 and until the passage of Florida Laws 1959 Chapter 59-417 (this is the present Section 551.15 which is mentioned in the first paragraph of this memorandum) *there appears no legislative sanction for dog racing meets or fronton operation periods in excess of ninety days in any twelve-month period or during the course of any 'racing season' for dogs or the operation of frontons.* This is the common denominator of all the legislation relating to these forms of authorized gambling. Chapter 59-417, *supra*, does not apply to relator but it is a clear expression of the consistent attitude of the Legislature not to extend the privilege to any plant to operate more than 100 days in any twelve-months period. . . . (Emphasis supplied.)

It can thus be seen both from the opinions of my predecessor in office and the decisions of the supreme court that jai alai frontons in Florida (except Volusia jai alai, which as mentioned, *supra*,

is in a different category) are entitled by law to 90 days of operation, which by past administrative interpretation by the racing commission has been extended to 100 days. It is clear therefore that 100 days is the *maximum* number that can be granted by the commission for jai alai operation.

In arriving at this conclusion I have not overlooked §551.04(1), F. S., cited by you. That section provides:

(1) Fix and set the dates within which any fronton may be operated; provided, however, that this section shall not be construed as authorizing the commission to fix and set dates for the operation of any fronton in any county where there is not more than one fronton in operation;

This section is of no relevancy to the instant question since it has no bearing on the *length* of a racing season or *number* of operating days of a jai alai fronton but deals specifically with the period or dates during which a fronton may operate. This statute is silent as to the length of a season or number of operating days and thus has no bearing on the question posed by you.

064-158—October 22, 1964

COURTS

PUBLIC DEFENDER—FEE ON APPEAL PAYMENT BY
COUNTY; INDIGENT DEFENDANT—CH. 63-409,
LAWS OF FLORIDA; §§25.241(3), 28.241,
142.01, 924.23, F. S.

To: William B. Goodson, County Attorney, Dade City

QUESTION:

Should the filing fee on appeal for an indigent represented by the public defender be paid from the fine and forfeiture fund of the county, or from the funds appropriated for the public defender's office?

As background for this question, you state that the board of county commissioners of Pasco county appropriated funds for the public defender of that circuit for the fiscal year 1963-64, that the public defender has appealed a conviction of an indigent client and that it is necessary for a filing fee to be paid in connection with such appeal.

The only question is whether such a filing fee is a direct obligation of the county or should be considered a part of the operating expenses of the office of public defender.

Chapter 63-409, the public defender law of Florida, empowers each county to expend money in furtherance of the provisions of that act. It also provides that the state shall pay the salary and allowable travel expense and leaves to the discretion of the counties the amount each shall provide for the "necessary expenses of his office, including salaries of his deputies, assistants and staff."

Although the law is silent on the subject, it would seem that "necessary expenses of his office" should include only predictable annual items such as salaries, stenographic help, office supplies and travel expense, for budget-making purposes. Salaries and travel expense of the public defenders are paid by the state. The remainder of such expenses must be borne by the counties in whatever amount each county commission shall determine is needed.

A filing fee for taking an appeal from a conviction in the circuit court or in a criminal court of record must be accompanied by the payment of a \$25 fee (§25.241(3), F. S.) for the appellate court. The clerk of the circuit court is entitled to a fee of \$3.50 upon institution of such appellate proceedings (§28.241, F. S.). The notice of appeal would be filed by the public defender on behalf of the indigent defendant. Section 924.23, F. S., directs the county to pay for the transcribing of a court reporter's notes for such appellate purposes where the appealing defendant is insolvent. In Florida appellate rule 6.9(f) it states that the clerk's costs incident to the appeal shall be paid by the county in case the defendant is adjudged insolvent.

The fine and forfeiture fund of each county "shall be paid out only for criminal expenses, fees and costs where the crime was committed in the county and the fees and costs are a legal claim against the county" (§142.01, F. S.).

I conclude, therefore, on the basis of the above, that the payment of filing fees for an indigent defendant in taking an appeal would be a charge against the fine and forfeiture fund of the county and not against the office expenses of the public defender and your question is answered accordingly.

064-159—October 28, 1964

COUNTY ORGANIZATION

COUNTY OFFICER—COMPENSATION—SALARIES FROM
OTHER POSITIONS INCLUDED IN INCOME OF OFFICE
—§§34.20, 34.21, 145.061, 145.12(3), F. S.; CHS. 57-1795
(AMENDING CH. 29502, 1953), 57-1796 (AMENDING
CH. 24868, 1947), 61-2754,
LAWS OF FLORIDA

To: Charles R. P. Brown, Attorney for Roger Poitras, Clerk of
Circuit Court, Fort Pierce

QUESTION:

Is the compensation of the clerk of the circuit court of St. Lucie county, as Secretary and treasurer of the St. Lucie county sanitary district as authorized by Laws of Florida, Ch. 57-1795, and the compensation of the clerk of the circuit court of St. Lucie county, as secretary and treasurer of the Fort Pierce port and airport authority, as authorized by Laws of Florida, Ch. 61-2754, personal compensation of the Clerk of the circuit court of St. Lucie county, or included in the salary of the clerk of the circuit court of St. Lucie county, as provided by Ch. 145, F. S.?

This presents the question of whether the clerk of the circuit court for St. Lucie county may retain as income personal to him two items of salary paid him by subdivisions of the county, or shall such extra compensation be considered income of the office and included in the total from which the clerk's annual salary of \$10,000 is to be paid.

In 1932, my distinguished predecessor, the late Cary D. Landis, ruled that the salary paid to the clerk of the circuit court as county auditor and clerk of the board of county commissioners must be

included in determining the amount of the fees and commissions received by the clerk. It was his conclusion that the clerk received this salary as clerk of the board of county commissioners solely by virtue of the fact that he is clerk of the circuit court, and that therefore it is one of the fees or commissions or emoluments received by the clerk. (AGO 1931-1932, p. 557) This provision still controls compensation paid the clerk of the circuit court as clerk to the board of county commissioners.

Again in AGO 058-133, this office concluded that fees received by the clerk of the circuit court in connection with naturalization proceedings are income of the clerk's office and must be so reported and accounted for. This opinion stated further:

The clerk of the circuit court as a county fee officer is required to account for all fees or commissions received for his official services to the board of county commissioners of the county in which he holds said office and all fees and commissions received by said clerk in excess of the expense of operating the clerk's office and his annual compensation as authorized by law must be turned over to the county. . . . the income of the office of the clerk of the circuit court includes the clerk's compensation for performance of any duty required of him as an official act, see *Orange County v. Robinson*, 111 Fla. 402, 149 So. 604; *Carlton, for use of Duval Co. v. Fidelity Deposit Co. of Maryland*, 113 Fla. 63, 151 So. 291, petition denied, 113 Fla. 63, 154 So. 317.

Compensation of the clerk for an official act must be accounted for as income of the clerk's office, the opinion concluded.

This office in AGO 064-94, released July 17, 1964, considered the case of the salary of the judge of the county court and concluded that the salary as authorized a county judge pursuant to §§34.20 and 34.21, F. S., is income personal to the county judge not to be included within the maximum salary or compensation as provided in §145.061, F. S.

That opinion was based on §34.21 which declares that "This compensation shall exclude all salaries, fees or compensation which the said judge of the county court as such might receive or be entitled to, under or by virtue of any other laws, but it shall not exclude or affect any salary, fees, or other compensation which the county judge, as such, may receive, or be entitled to."

No such reservations appear in the two statutes establishing other compensation for the clerk of the circuit court of St. Lucie county.

Chapter 57-1795, amends Ch. 29502, 1953, to specify in §3 thereof that "The clerk of the circuit court of St. Lucie county, Florida, shall serve as secretary and treasurer of said district (St. Lucie County Sanitary District) and his compensation therefor shall be \$75.00 per month. . . ."

Chapter 57-1796, amends §6 of Ch. 24868, 1947, to provide that "The clerk of the circuit court of St. Lucie county, Florida, shall serve ex officio as secretary and treasurer of the Fort Pierce Port Authority and his compensation therefor shall be \$75.00 per month."

In each of these acts, the salary is paid to one who holds it by virtue of his being clerk of the circuit court. For the port authority, the clerk serves ex officio. The port authority act was amended by Ch. 61-2754, and in §7 thereof, the salary of the clerk of the

circuit court is to be fixed by the board of commissioners of the Fort Pierce port and airport authority, eliminating the previous statutory compensation. The board, we are informed, has fixed this compensation at \$125 per month.

Amounts received by the officer for services rendered by virtue of the office in excess of the sum the officer is allowed from the "net income" of the office as his "yearly compensation" are to be held in trust by the officer to be accounted for and paid over by the officer as required by the statute. *Sparkman v. County Budget Commission*, 103 Fla. 242, 137 So. 809. There are no subsequent decisions of the Florida courts on this point.

The clerk of the circuit court of St. Lucie county has been paying both the above salaries into a special fund as provided in §145.12(3), F. S., being a legal projection of Ch. 11954, 1927, which fixed the maximum compensation for all county officers, including the clerk of the circuit court. In reviewing that act on the issue of whether or not county officers are required to account to the county for all fees, commissions or other funds coming in their hands by virtue of their office, the supreme court of Florida concluded that an accounting was required of such income and that the maximum amount any county officer could receive by virtue of his office was fixed by the 1927 act. (*Orange County v. Robinson*, 111 Fla. 60, 149 So. 19. See also *Flood v. State*, 100 Fla. 70, 129 So. 861.)

In *Orange County v. Robinson*, supra, the court determined that the salary paid by the board of county commissioners to the clerk of the circuit court as clerk of the board "must be included in the income of the office from which the allowance of the yearly compensation of such clerk is to be deducted and the remainder paid to the county under the statute."

Search of subsequent decisions reveals no change in such pronouncements on this subject.

In answer to your question, it is my opinion that existing general, local or special laws do not in this particular instance authorize the clerk of the circuit court to retain as income personal to him the salaries voted by the board of commissioners of the Fort Pierce port and airport district, or by the governing board of the St. Lucie county sanitary district, but such is income of the office of the clerk of the circuit court of St. Lucie county.

However, I suggest that if it is the intent of these two boards that the salary, which each has voted for the clerk of the circuit court for the extra work of acting as secretary and treasurer, shall be personal to the clerk and not be considered income of his office, each special act may be amended to accomplish this result. The wording recited above in the case involving a judge of the county court and referring to the special act dealing with the salary of the judge of the county court as distinguished from compensation to the same individual as county judge, also would be applicable in an amendment to the acts authorizing extra compensation to the clerk of the circuit court of St. Lucie county.

064-160—November 5, 1964

INSURANCE

RECIPROCAL INSURERS PLAN WITHOUT ATTORNEY-IN-FACT OR SUBSCRIBER'S RECIPROCAL AGREEMENT OF INDEMNITY—§§629.011, 629.021, 629.041, 624.0203, F. S.

To: J. Edwin Larson, State Insurance Commissioner, Tallahassee

QUESTION:

May the owners of property become reciprocal insurers without a subscriber's reciprocal agreement of indemnity and the appointment of an attorney-in-fact?

"Reciprocal insurance" is a system whereby individuals, partnerships, or corporations, engaged in a similar line of business, undertake to indemnify each other against certain kinds of losses by means of a mutual exchange of insurance contracts, usually through a common attorney-in-fact appointed for such purpose by each of the underwriters, under an agreement, whereby the members become both an insured and an insurer with several liability only. (29 Am. Jur., §102, P. 511.)

Florida defines "reciprocal insurance" as "that resulting from an interexchange among persons, known as 'subscribers,' of reciprocal agreements of indemnity, the interexchange being effectuated through an 'attorney-in-fact' common to all such persons." (§629.011, F. S.)

States have the power to regulate foreign reciprocal insurance companies doing business within the state, and to impose regulations on such companies. *Hoopeston Canning Co. v. Cullen*, 318 U. S. 313, 87 L.Ed. 777, 63 Sup. Ct. 602, 145 ALR 1113.

Section 629.021, F. S., provides at subsection (1) that a "reciprocal insurer means an unincorporated aggregation of subscribers operating individually and collectively through an attorney-in-fact to provide reciprocal insurance among themselves," and at subsection (2) it states that "a reciprocal insurer *may be authorized to transact insurance in this state subject to applicable provisions of this code.*" (Emphasis supplied.)

Section 629.041, F. S., provides at subsection (1) that "a reciprocal insurer may, *upon qualifying therefor as provided for by this code*, transact any kind . . . of insurance defined by this code, *other than life or title insurance,*" and at subsection (2) it states that "such an insurer may purchase reinsurance upon the risk of any subscriber, and may grant reinsurance as to any kind of insurance it is authorized to transact direct." (Emphasis supplied.)

Reciprocal or reinsurance associations have been formed for writing various kinds of property and liability insurance, and the extent of the powers of a particular association is governed, as in cases of other insurance companies, primarily by the articles of agreement, and by applicable state statutes. (29 Am. Jur. §102, P. 512) In the absence of state statute, reciprocal insurance associations have been formed to write many kinds of insurance, including fire; fire and lightning; use and occupancy and sprinkler leakage; and fire loss or other damages to property. (See 94 ALR 844; 141 ALR 766; 145 ALR 1121)

Section 624.0203, F. S., provides that "to qualify for and hold authority to transact insurance in this state an insurer must be otherwise in compliance with this code and with its charter powers,

and must be . . . a reciprocal insurer of the same general type as may be formed as a domestic insurer under this code . . ." with certain exceptions. (Emphasis supplied.)

Thus, it would appear that absent the appointment of an attorney-in-fact for a group of insureds and an interexchange of binding reciprocal agreements of indemnity, no reciprocal insurance is created. Since the essence of a reciprocal insurance program is the members of the unincorporated association underwriting the losses of each other, the question presented is answered in the negative.

064-162—November 5, 1964

STATE AUDITING DEPARTMENT

AUDIT OF MUNICIPAL ACCOUNTS—ADVANCE DEPOSIT IN ESCROW FOR REASONABLE COSTS—§167.61, F. S.; §4 ART. IX, STATE CONST.

To: Ernest Ellison, State Auditor, Tallahassee

QUESTION:

May the state auditing department require the municipality, whose accounts the department is ordered to audit pursuant to §167.61, F. S., to deposit in advance in escrow funds in an amount sufficient to cover the estimated reasonable cost of such audit?

In your letter of inquiry you advise that from time to time pursuant to the provisions of §167.61, F. S., you, as state auditor, are called upon to audit the accounts and records of municipalities. Apparently, because of the limited availability of personnel in the state auditing department, it is necessary to employ additional auditors for those specific examinations.

You advise that the current appropriation for the operation of the state auditing department and the request upon which it was based, as well as the recommendation of the budget director to the legislature, include no funds to defray the cost of municipal audits by your department. In addition, §167.61, F. S., requires that the expense of municipal audits by your department shall be paid by the municipality.

You further advise that in the past on several occasions, municipalities have refused to reimburse the state auditor the cost of audits made pursuant to said section.

The question presented is answered in the affirmative for the following reasons.

It is fundamental that state funds may not be disbursed except in accordance with legislative appropriation, §4, Art. IX, State Const. In addition, the legislature has expressly provided that cost of audits of municipalities by the state auditing department shall be borne by the municipality audited, §167.61, F. S.

In view of past experiences, it would appear reasonable and necessary to prevent a diversion of state funds from their intended purpose that payment of cost by such municipality be appropriately guaranteed. The method outlined in your question, viz, escrow agreement would appear extremely appropriate.

064-163—November 6, 1964

FELONS

EFFECT OF CONVICTION ON CIVIL RIGHTS—§§40.01, 97.041, 99.021, 114.01, 948.01, F. S.

To: *Francis R. Bridges, Jr., Florida Parole Commission, Tallahassee*

QUESTION:

Is a person who has been adjudged guilty of a felony in this state and placed on probation, with the imposition of sentence suspended, deprived of his civil rights in this state?

A person who is convicted of a felony under the laws of Florida loses certain civil rights, for example, the right to vote (§97.041, F. S.) and the right to be a juror (§40.01, F. S.). Every candidate for nomination for any office is required to make an affidavit that he is a qualified elector of this state (§99.021, F. S.) and he cannot truthfully make such an affidavit if he has been convicted of a felony in this state and has not been restored to his civil rights. Every office is deemed to be vacant if the incumbent is convicted of a felony under the laws of Florida (§114.01, F. S.). So, a person does lose important civil rights when he is thus convicted.

This brings us to the question of when a person may properly be said to be "convicted." I think that a defendant is convicted when the court adjudges that he is guilty, regardless of whether the court thereafter sentences him or withholds the imposition of sentence and places him on probation.

In *Weathers v. State*, 56 So.2d 536, it appeared that the question arose as to whether a man was "convicted" when he was adjudged guilty and the imposition of sentence was deferred. The supreme court of Florida held that he was "convicted" even though sentence had not been imposed and, among other things, said (text 538):

From an examination of the opinions of this court on the subject it seems clear that a conviction amounts to more than a verdict of a jury finding guilt, but it is not clear whether conviction has been taken to mean a sentence as well as a judgment of guilty. Confusion seems to have resulted from the indiscriminate linking of 'judgment' with 'sentence,' and with 'punishment.'

Our present thought is that *one is convicted when the jury returns a verdict of guilty and the judge clinches the finding by adjudicating the guilt* though the prisoner may never be punished. How can it be logically said that a man is innocent because he has never been punished? The finding by jury and adjudication by court settle the fact of guilt; the punishment when meted out is simply the penalty for established misconduct. (Emphasis supplied.)

A defendant would be just as "convicted" by an adjudication of his guilt based upon his plea of guilty or nolo contendere, or based upon a finding of guilt by the court trying the case without a jury after the defendant waives trial by jury, as he would be by an adjudication of guilt based upon a jury's verdict of guilty.

The supreme court's said holding in the *Weathers* case was cited by it with approval in the subsequent cases of *Gordon v.*

State, 119 So.2d 753, text 757, and Delta Truck Corporation, Inc. v. King, 142 So.2d 273, text 275.

In *Washington v. Mayo*, 77 So.2d 620, text 622, the said supreme court made the following statements with regard to what constitutes a conviction:

... While the term 'conviction' has sometimes been loosely used interchangeably with 'sentence,' or as connoting the entire process of criminal prosecution, see *Bishop v. State*, 41 Fla. 522, 26 So. 703; *Daughtrey v. State*, 46 Fla. 109, 35 So. 397; *Smith v. State*, 75 Fla. 468, 78 So. 530; *Weathers v. State*, Fla., 56 So.2d 536, it is plain that a 'sentence' is not a necessary ingredient of a 'conviction' where the latter term is used in its proper sense. *Timmons v. State*, 97 Fla. 23, 119 So. 393; *Gordon v. State*, 86 Fla. 255, 97 So. 428.

(5,6) By literal definition, a conviction is 'that legal proceeding . . . which ascertains the guilt of the party.' 1 *Bouv. Law Dict.*, *Rawle's Third Revision*, p. 672. Accord *Timmons v. State*, *supra*. And the term 'sentence,' as explicitly defined in our statutes governing criminal procedure, means 'the pronouncement by the court of the penalty imposed on the defendant.' Section 921.05, Florida Statutes 1953, F.S.A. See also sections 921.02 and 924.06 (1) and (2).

(7) In the face of this clear designation of the *sentence* as a *post-conviction step* in the process of criminal prosecution, . . . (Emphasis supplied.)

In the light of these court decisions, I consider the inescapable conclusion to be that a defendant is "convicted" of an offense when he is adjudged guilty thereof by the court upon the basis of a guilty verdict returned by a jury, or upon a plea of guilty or *nolo contendere*, or upon a finding of guilty by the court when it tries the case without a jury after the defendant has waived trial by jury, regardless of whether or not such defendant is ever sentenced for his offense. This being so, a defendant who has been adjudged guilty of a felony in this state does lose civil rights which cannot be regained by him except by procuring a pardon from the state board of pardons, which has the discretionary power to grant pardons after conviction.

I am aware of the fact that AGO 042-427, which was rendered by one of my predecessors in office in 1942 and which is found in AGO 1941-1942 p. 784, expressed a view contrary to the one which I have hereinabove arrived at. It must be pointed out, however, that at the time said former opinion was rendered, none of the enlightening supreme court cases mentioned above had been decided.

I think it pertinent to mention the fact that §948.01, F. S., as it now reads after having been amended since its original enactment in 1941, provides that the court may place a defendant on probation and withhold the imposition of sentence, with or without an adjudication of the guilt of the defendant, in a case where the defendant has been found guilty by a jury's verdict of an offense not punishable by death, or has been found guilty by the court of such an offense when the court tries the case without a jury, (which can be done only if the defendant waives trial by jury), or if a defendant enters a plea of guilty or a plea of *nolo contendere* to a charge of such an offense. If the court exercises its discretion under this statute to withhold the imposition of sentence and place

the defendant on probation without adjudging him guilty, then, of course, he has not been "convicted" and does not lose any of his civil rights even if the crime involved is a felony.

Your question is answered in the affirmative.

064-164—November 3, 1964

**COUNTY SUPERINTENDENTS OF PUBLIC INSTRUCTION
APPOINTIVE—COMMISSION, METHOD OF OBTAINING**

To: *Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee*

QUESTIONS:

1. Is an appointive superintendent legally entitled to and shall he receive a commission from the governor upon assuming office?

2. If question 1 is answered in the affirmative what procedure should be followed in obtaining the commission?

In the case of *Hancock v. Board of Public Instruction of Charlotte County*, 158 So.2d 519, the supreme court held:

Constitutional amendment providing for county referendum on question of making office of county superintendent of public instruction appointive does not repeal constitutional provision for a four-year term of office for all county superintendents or any other constitutional provision relating to office of county superintendent except provision that such office shall be elective.

This case holds, in effect, that no change has been made in the constitutional office of county school superintendent in those counties where appointive superintendents have been authorized except the method of selecting the superintendent.

Question 1 is answered in the affirmative.

As to question 2, the procedure for obtaining a commission should be the same as followed by elective county superintendents.

064-165—November 9, 1964

COURTS

**TRANSFER OF CASES FROM LAW TO CHANCERY OR
VICE VERSA—FEE—§28.241, F. S.**

To: *J. Alex Arnette, Clerk of Circuit Court, West Palm Beach*

QUESTION:

Where a civil case filed either in the chancery or the law side of the court is transferred by order of the court to the other side, does the case get a new number and become a new case and should a fee be collected as though the transfer were a new case?

Section 28.241, F. S., states:

The party instituting any civil action, suit or proceedings in the Circuit Court shall pay to the Clerk of the

said court the fee of \$12 in all cases where there are not more than five defendants. . . .

Section 28.241(1) also contains the following:

That part of the within fixed or allowable fees as is not by local or special law tied to the special purposes herein specified shall constitute the total fees of the clerk of said court for all services performed by him in civil actions, suits or proceedings.

The transfer of a case from equity to law or vice versa is covered in rule 1.39 of the Florida rules of civil procedure in subparagraph (a), which reads as follows:

If at any time it appears that an action has been commenced either in equity or at law when it should have been brought on the opposite side of the court it shall be forthwith transferred to the proper side and proceeded with without interruption. In such case the court, without notice, may enter an order noting that the case was brought on the wrong side of the court and further ordering the clerk to docket the case on the proper side. The case shall proceed thereafter as though it were originally instituted on the proper side of the court and no further amendments shall be necessary to change phraseology in the pleadings so far as this error is concerned. The case shall proceed as though originally instituted on the proper side of the court.

Throughout the quoted part of rule 1.39(a), the rule refers to "the case" and notes that "the case shall proceed as though originally instituted on the proper side of the court."

For all practical purposes this is the same suit when transferred as it was originally. The supreme court of Florida noted in *Manning et al. v. Clark, et al.*, Fla., 71 So.2d 508 that "when a cause is transferred to the law side of the court after it has been commenced in equity, as provided by Equity Rule 75, 31 F.S.A., and when the transfer is to the law side of the same court (as it is here) the order of transfer makes the original papers in the equity case a part of the common law case so far as they may be applicable. This is plain from the very language of the rule itself and such conclusion is certainly in accordance with the spirit thereof."

Rule 75, noted here, is the same as rule 1.39 and originally appeared as §75 of Ch. 14658, 1931.

Rule 1.39 requires the court, without notice, to enter an order noting that the case was brought on the wrong side of the court and further ordering the clerk to docket the case on the proper side.

At no point in the consideration of this rule is it contemplated that the case so transferred becomes a new case in point of fact but rather that the case shall proceed as though it were originally instituted on the proper side of the court.

It is my opinion therefore that when a case is transferred from equity to law or vice versa by order of the court, the clerk is ordered to docket the case on the proper side and give it a number accordingly, but such transfer does not constitute the filing of a new case.

064-167—November 20, 1964

ADMINISTRATIVE PROCEDURE

APPLICATION OF CH. 120, F. S., PARTS I AND II, ADMINISTRATIVE ADJUDICATION PROCEDURE TO INTERNAL RULES AND REGULATIONS OF STATE AGENCY—

§§120.20, 120.21(4), 120.021(2), F. S.

To: *Walter R. Lee, Jr., Chairman, Florida Council for the Blind, Gainesville*

QUESTION:

Whether or not the appeal procedure set forth by Ch. 120, part II, administrative procedure act, F. S., applies to the dismissal of employees of an agency under its own internal rules?

Chapter 120, administrative procedure act, F. S., (Ch. 61-280) was passed in 1961 and consists of 3 parts: part I, rule making (§§120.011-120.071, 120.09); part II, administrative adjudication procedure (§§120.20-120.28); and part III, judicial review (§§120.30-120.331).

The wording from which the question as set forth above arises appears in part II, §§120.20 and 120.21(4), F. S. The pertinent part of §120.20 is set out as follows:

... to establish minimum requirements for the adjudication of any party's legal rights, duties, privileges or immunities by state agencies. . . .

The pertinent part of §120.21(4), F. S., is as follows:

Party means *individuals*, . . . (Emphasis supplied.)

It would seem to appear, therefore, that *any* rule or regulation adopted by a state agency which affects the legal rights, duties, privileges or immunities of an individual would be within the purview of Ch. 120, part II, administrative adjudication procedure, F. S. However, §120.021(2), part I, administrative procedure act, F. S., states that "Rule means rule, order, . . .; but rule *shall not* include matter concerning only the *internal management of the agency* . . ." (Emphasis supplied.)

The fundamental rule for construction of a statute is to ascertain and give effect to the intention of the legislature as expressed therein (*City of St. Petersburg v. Siebold*, 48 So.2d 291). In ascertaining such intention a statute must be construed as a whole and effect given to all its parts thereof (*Snively Groves v. Mayo*, 135 Fla. 300, 184 So. 839), and all sections of a statute must be considered and harmonized so that the whole scheme may be made effectual.

Applying the foregoing principles, parts I and II of Ch. 120, F. S., must be read together and in connection with each other.

Accordingly, rules strictly internal in nature which are used as a basis for the dismissal of employees within said agency, being expressly excluded from Ch. 120, part I, F. S., would appear not to fall within Ch. 120, part II, administrative procedure act. Therefore, the appeals procedure set forth by Ch. 120, part II, administrative procedure act, F. S., would not apply to the dismissal of employees of an agency under its own internal rules.

064-168—November 24, 1964

INSURANCE

AUTHORIZED ON COUNTY-OWNED BUILDINGS AND CONTENTS—§125.01(2), F. S.

To: *Dean Tooker, County Attorney, Stuart*

QUESTION:

May a board of county commissioners purchase a policy of insurance covering the contents of county-owned buildings?

Section 125.01(2), F. S., authorizes the board of county commissioners to insure county buildings whenever they deem such to be expedient.

I am of the opinion that the legislative expression authorizing the board of county commissioners to insure county buildings, is a statement of public policy and a legislative directive that the property be protected by adequate insurance. Although the statute expressly relates to county buildings, it is my opinion that it provides ample authority for the board of county commissioners to insure county building contents. Hence, your question is answered in the affirmative.

064-169—November 24, 1964

TAXATION

APPLICATION FOR HOMESTEAD TAX EXEMPTION—MUNICIPAL TAXES—§§167.72, 192.16, F. S.; §20, ART. III, §5, ART. IX, §7, ART. X, STATE CONST.; CHS. 21988, 1943, 26899, 1951, LAWS OF FLORIDA

To: *William T. Swigert, Attorney at Law, Ocala*

QUESTION:

Must a homesteader entitled to homestead tax exemption under §7, Art. X, State Const., who files his application for such exemption with the county assessor of taxes in accordance with §192.16, F. S., also file a like application with the municipal tax assessor when his homestead is located in an incorporated municipality?

Section 167.72, F. S., provides that "every person entitled to homestead exemption as provided by section 7, Article X, of the constitution of the state, upon filing an application therefor in proper form with the county tax assessor in the county in which such homestead is situated, shall be deemed thereby to have made application for such homestead exemption from taxation of the municipality in which such homestead is located, and the municipal tax assessor shall treat said application and give it the same consideration as if it had been personally filed with him." The remainder of this section related to the manner by which the municipal tax assessor obtains information of the filing of such application with the county assessor of taxes. Said §167.72, F. S., was derived from Ch. 21988, 1943, the title of which was as follows: "An Act Providing a Method for Filing One Application for Homestead Exemption from County and Municipal Taxation, under Sec-

tion 7, Article X, of the Constitution of Florida." When the language of said §167.72, F. S., is considered with and in the light of said title of said Ch. 21988, 1943, there can be no doubt of the legislative intent and purpose of §167.72.

Section 7, Art. X, State Const., contains no express provision requiring the filing of an application for homestead exemption from taxation; however, said section does contain the provision that "the Legislature may prescribe appropriate and reasonable laws regulating the manner of establishing the right to said exemption." The Florida legislature, by Ch. 26899, 1951, required that a homesteader be a legal resident of Florida for 1 year or more before he would be permitted to claim the exemption; in *Sparkman v. Scott*, Fla., 58 So.2d 431, the supreme court of Florida, deeming the said act not an appropriate and reasonable regulation held the same unconstitutional. We do not feel that §167.72, F. S., is an inappropriate or unreasonable regulation, but that it is an appropriate and reasonable regulation, and that it is valid and constitutional, unless violative of the provision in §5, Art. IX, State Const., that "cities and incorporated towns shall make their own assessments for municipal purposes upon the property within their limits." A provision that only one application for homestead tax exemption be filed, and that with the county assessor of taxes, to entitle a homesteader to homestead tax exemption, if otherwise entitled thereto, from both county and municipal taxes, does not appear to be in conflict with the above provision that cities and incorporated towns make their own assessments. There appears no violation of said §5, Art. IX, State Const.

We next consider those cases, if any, where municipal legislative charters contain their own provisions regulating the filing of applications for homestead tax exemption. Although §20, Art. III, State Const., provides that "the legislature shall not pass special or local laws . . . for assessment and collection of state and county taxes," we find no like constitutional provision as to municipal taxes. It seems that §167.72 is applicable to all municipal corporations *unless* their legislative corporate charters provide otherwise and specifically require the filing of an application for homestead tax exemption with the municipality or its taxing official, and such requirements are in conflict with said §167.72, F. S.

The above-stated question is answered in the negative unless the municipal legislative charter provides otherwise and such provision is in conflict with said §167.72, F. S.

064-170—December 4, 1964

PUBLIC PRINTING

LEGISLATIVE PRINTING, CONTRACTS FOR—CH. 283;
§§283.01, 283.03-283.07, F. S.

To: *Edwin G. Fraser, Secretary of the Senate and Lamar Bledsoe, Chief Clerk, House of Representatives, Tallahassee*

QUESTIONS:

1. May the legislative printing contract be divided, placing the daily journals, calendars, printed bills, bound volumes of journals in one contract; and the pamphlet laws, bound volumes of the general laws and special laws in another?

2. Are letterheads, envelopes, and miscellaneous forms considered to be Class A printing?

"All the public printing of the state shall be let out upon contract to the lowest responsible bidder, who shall furnish all paper and other material used in printing and binding" (§283.01, F. S.). "All the public printing of this state shall be done in the state, and the bond given by any contractor for such printing shall so state." (§283.03, F. S.) "All the public printing of the state shall be divided into two classes, Class A, which shall embrace all printing required for the legislative department of the state government, and all of the printing required to be done for the supreme court, and Class B, which shall embrace all of the printing required for the state not included in Class A" (§283.04, F. S.). Contracts for Class A printing are awarded by the board of commissioners of state institutions, after notice thereof by publication as is provided by §283.05, F. S. "Each award of contract, or contracts, for printing shall be made separate and upon a unit bid price for each item to be contracted for by the board of commissioners of state institutions. The board of commissioners of state institutions shall require to be submitted with the bids for public printing, designated Class A, a certified check in an amount not to exceed two thousand dollars." (§283.06, F. S.) Contracts for Class A printing are awarded for periods of 2 years, or for 4 years, at the discretion of the board of commissioners of state institutions (§283.07, F. S.).

From the above-mentioned statutes we find that Class A public printing embraces "all printing required for the legislative department of the state government, and all of the printing required to be done for the supreme court." (§283.04, F. S.) This statute has not been amended since the 1956 amendment of Art. V, State Const., at the general election in Nov. 1956, which provided for the establishment of the district courts of appeal in this state. The question of printing for said courts is not here involved and will not be here further discussed. Section 283.04, *supra*, seems to classify "all printing required for the legislative department of the state government" as public printing within the purview of Ch. 283, F. S. We find little case law on the question of what is public printing. In *Ellis v. State*, 4 Ind. 1, text 5, it was held that printing performed for the legislature or for agents of the state government was public printing. In *State ex rel. Arthur Kudner, Inc. v. Lee*, 150 Fla. 35, 7 So.2d 110, text 115, the supreme court held that printing of pamphlets advertising Florida citrus fruits and products obtained by the Florida citrus commission, was public printing, within the purview of Ch. 283, F. S. In *Board of Commissioners v. Frederick*, 50 Colo. 464, 115 P. 514, text 516, it was held that the publication of a list of nominations for state and county offices as required by statute, was "county printing" as the work was to be paid for by the county. Expenditures incurred in carrying out governmental purposes (35 Words and Phrases, Perm. Ed., 567-569), expenses of governmental officers and employees (35 Words and Phrases, Perm. Ed., 566) as well as expenses of municipal officers and employees (35 Words and Phrases, Perm. Ed., 577), when incurred in carrying out governmental duties and obligations have been deemed to be expenditures for public purposes.

Public printing, within the purview and intention of Ch. 283, F. S., whether classified as Class A or Class B printing, includes all printing to be obtained for or by the state, or its officers,

boards, commissions, agents or employees, however obtained when such printing is to be paid from public funds. As Class A printing embraces "all printing required for the legislative department of the state government," this quoted language appears to be all inclusive, so that if the printing is "for the legislative department of the state government" it should be classified as Class A printing, irrespective of the nature of the same. Letterheads and envelopes for members of the legislature to be used in official correspondence would appear to be within the purview of Class A printing as defined in §283.04, F. S. The "miscellaneous forms" also mentioned in your request for opinion, if they are to be printed to specification would appear also to be public printing within said Class A, however, stock forms generally available to the public would not appear to be within said Class A public printing, when they contain no specified printing but are mere stock forms.

It is provided in §283.06, F. S., that "each award of contract, or contracts, for printing shall be made separate and upon a unit bid for each item to be contracted for by the board of commissioners of state institutions," (Emphasis supplied.) which language seems to permit the awarding of 2 or more contracts where circumstances may dictate the separate awarding of contracts. In the light of this we hold that "the legislative printing contract may be divided, placing the daily journals, calendars, printed bills and bound volumes of the journals in one contract," or, at the discretion of the board of commissioners of state institutions by further dividing the same, "and the pamphlet laws, bound volumes of the general laws and special laws in another." This answers your first question in the affirmative.

Under present existing statutes we are inclined to the view that letterheads, envelopes and miscellaneous forms (other than mere stock forms) to be used by members of the legislature in connection with their powers, duties and obligations as such, would be subject to classification as Class A printing; but would be subject to a separate contract at the discretion of the board of commissioners of state institutions.

064-171—December 8, 1964

TAXATION

DUTIES, OBLIGATIONS AND POWERS OF THE COMPTROLLER AND STATE BUDGET COMMISSION IN CONNECTION WITH TAXATION—§§192.31, 193.021, 193.03, 193.06, 193.11-193.13, 193.22, 193.29, 193.39, 193.40, 196.14, 196.16, F. S.; CHS. 61-691, 63-250, LAWS OF FLORIDA; §1, ART. IX, §7, ART. X, STATE CONST.

To: *State Budget Commission, Capitol Building and Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. What are the powers and duties of the state comptroller under §192.31, F. S., as well as other applicable statutes and laws, in connection with the obtaining of uniform and equal taxation throughout the several counties of Florida?
2. What are the facilities available to the state comp-

troller or the state budget commission, or both, to require or direct uniform and equal valuations for purposes of ad valorem taxation throughout Florida?

The letter of Oct. 27, 1964, from Hon. Thomas C. Britton to Hon. Ray E. Green, as state comptroller, concerning the level of assessed value of real and tangible personal property within the several counties comprising the central and southern Florida flood control district, to the just or full cash value of such properties, was heretofore transmitted to the state budget commission because of the duties of the said comptroller and state budget commission, under and pursuant to §192.31, F. S., in connection with the assessment and collection of ad valorem taxation. That letter, after consideration by the state budget commission, was transmitted to this office for consideration and advice concerning the duties of the comptroller and state budget commission in connection with ad valorem taxation, as well as their powers and authority in this connection. This letter, when considered in connection with §192.31, F. S., and other applicable taxing statutes, poses the above questions for the consideration of this office.

Under §1, Art. IX, State Const., the legislature is required to "prescribe such regulations as shall secure a just valuation of all property, both real and personal, exempting such property as may be exempted by law for municipal, education, literary, scientific, religious or charitable purposes." Sections 193.06, 193.11, 193.12, 193.13, 193.22, and other sections of the Florida Statutes, prior to their 1963 amendments, required that taxable properties be assessed for ad valorem tax purposes on the basis of their full cash, true or just value. Chapter 63-250, now appearing as §193.021, F. S., provided a formula designed to obtain the just value of taxable properties, as required by §1, Art. IX, State Const. Sections 193.06, 193.11, 193.12, 193.13 and 193.22, F. S., were amended by Ch. 63-250, so as to refer to §193.021, F. S., as a formula for determining the taxable value of real and tangible personal properties.

The supreme court of Florida has held, in *Cosen Investment Co. v. Overstreet*, 154 Fla. 416, 17 So.2d 799, that, since the adoption of the Florida homestead tax exemption amendment to the State Const. (§7, Art. X, State Const.), to prevent inequalities between taxpayers, all real properties must be assessed on the basis of their cash or just values. Assessments or valuations below or above such full cash or just value will result in either the homesteaders or the non-homesteaders paying less than their full share of taxes or in paying more than their full share of taxes. To the same general effect, see also *McNayr v. DuPont Plaza Center*, Fla., 166 So.2d 142; *Sproul v. Royal Palm Yacht & Country Club, Inc.*, Fla. App., 143 So.2d 900; *Lanier v. Tyson*, 147 So.2d 365, text 372 and 373; and *Schleman v. Connecticut General Life Ins. Co.*, 151 Fla. 96, 9 So.2d 197. Under these court decisions it is clearly the duty and obligation of the county assessors of taxes, as well as the boards of county commissioners sitting as boards of tax equalization, to assess all real and tangible personal property on the basis of full cash or just value and, where equalization is necessary, to equalize on the same basis.

The allegations of the complaint in *City of North Miami Beach, et al., v. Sam Elcook, et al.*, lately pending in the district court of the U. S., in and for the southern district of Florida, Miami Division, Civil Case No. 64-522, illustrate the effect of valuations for

purposes of ad valorem taxation on different ratios of assessed value to full or true cash value. It was alleged that the records of the Florida railroad assessment board show variations between the several counties within the said central and southern Florida flood control district. We have here presumed a parcel of real estate in each of said counties with a full cash or true value of \$10,000, and show the percentage of value used by the tax assessor of the several counties, according to the percentages shown by the railroad assessment board records, supra, the assessed value in the particular county and the amount of taxes imposed, presuming a uniform millage of 3 mills on the dollar of assessed value, on the said property in each of the said counties:

County	Percentage of Value	Assessed Value	Tax
Glades	39.34%	\$ 3,935.00	\$11.81
Hendry	40.07%	\$ 4,007.00	\$12.02
Highlands	41.33%	\$ 4,133.00	\$12.40
Volusia	42.02%	\$ 4,202.00	\$12.61
Monroe	47.19%	\$ 4,719.00	\$14.16
Dade	47.27%	\$ 4,727.00	\$14.18
Orange	54.00%	\$ 5,400.00	\$16.20
Okeechobee	57.00%	\$ 5,700.00	\$17.10
Indian River	60.00%	\$ 6,000.00	\$18.00
Palm Beach	60.00%	\$ 6,000.00	\$18.00
Lee	67.14%	\$ 6,714.00	\$20.14
Brevard	74.00%	\$ 7,400.00	\$22.20
Broward	75.00%	\$ 7,500.00	\$24.00
Polk	80.00%	\$ 8,000.00	\$24.00
St. Lucie	80.00%	\$ 8,000.00	\$24.00
Seminole	100.00%	\$10,000.00	\$30.00

These tax variations are material in amount and point up possible inequalities in flood control taxes as between the several counties within the district. This inequality could be corrected by the assessment of all taxable properties throughout the district at the same percentage of assessed value to full cash or just value, or by an adjustment of millages between the said counties in the manner used in connection with the southwest Florida water management district, under §8, Ch. 61-691. Either method would prevent the apparent inequalities above-mentioned as to flood control district taxes. As above pointed out, the statutes, constitution and laws of Florida require the assessment of taxable properties within the state on the basis of their full cash or just value, and permit valuation on no other basis.

Section 192.31, F. S., provides in part that "the Comptroller shall, *under the supervision of the State Budget Commission*, prescribe and furnish all forms to be used by county assessors, tax collectors, clerks of the circuit courts and boards of county commissioners in the assessing and collecting of taxes . . . The Comptroller shall have supervision of the assessment and valuation of property, *under the supervision of the state budget commission*, so that all property will be placed on the tax rolls and the valuations thereof will be uniform and equal, as required by the Constitution and he shall also have supervision over the collection of such taxes. The Comptroller shall, upon the approval thereof by the State Budget Commission, establish and promulgate standard measures of values not inconsistent with those standards provided by law

to be used by tax assessors in all counties, including taxing districts, in arriving at assessments of all property, which standard measures of value shall be deemed and held prima facie to be the standard measures of just valuation contemplated by the Constitution of this state in matters of taxation and tax assessors and county boards of equalization shall follow and apply such standard measures of value in arriving at assessments of all property . . ." Section 192.31 (2), F. S., provides procedures for the establishment and promulgation of such standard measures of value. Before such standard measures of value become effective and operative they must have the approval and must be adopted by the *State Budget Commission*. Section 192.31 (3) provides a procedure for amending and correcting such standard measures of value from time to time. A Florida Tax Assessor's Manual was prepared, approved and adopted by the Florida budget commission, and promulgated and distributed to the taxing officials around 1959. (Emphasis supplied.)

Pages 25-50 of that manual deal generally with the question of property valuation for the purposes of taxation. The tenor of these pages in the manual is that all property, real and personal, is required by law to be valued for purposes of ad valorem taxation on the basis of its full cash or true value (determined in accordance with and in conformity to §193.021, F. S.) and not otherwise. This manual, the Florida Constitution, the Florida Statutes, and the decisions of the courts of last resort of this state, require that all taxable properties be assessed for purposes of ad valorem taxation on the basis of their full cash or just value, arrived at in the manner provided in and by said §193.021, F. S., and that such properties be assessed on no other basis.

The effect of the Florida Constitution, the Florida Statutes, the decisions of the courts of last resort of Florida, and the said Florida Tax Assessors Manual is to direct and instruct the county assessors of taxes and the county boards of tax equalization, when assessing taxable properties, and when equalizing such assessments, to impose ad valorem taxes on the basis of the full cash or just value of the properties taxed, and not otherwise. These requirements are applicable to the several counties lying in whole or in part within the boundaries of the central and southern Florida flood control district, as well as all other counties of the state.

There is a presumption that an assessor of taxes in this state conformed to the applicable taxing statutes and laws when making a tax assessment and that the valuations placed on taxable properties conformed to the requirements of applicable taxing laws, statutes, rules and regulations, and are valid. Persons questioning the sufficiency of such an assessment and valuation, and contending that it does not conform to the requirements of the law have the burden of showing nonconformity by adequate proof. (*Kent Corp. v. Board of County Commissioners of Broward County*, 160 Fla. 900, 37 So.2d 252, decided Oct. 22, 1948).

In that case, the court remarked—"while his (assessor of taxes) opinion is not conclusive by any means, it is entitled to great weight." Thus we proceed from the premise that the several assessors of taxes of the counties wholly or partly within the central and southern Florida flood control district have followed the requirements of the statutes and laws when making the valuations complained of, and persons complaining of the same have the obligation of impeaching such valuations by competent and sufficient evidence. In the *Kent* case, *supra*, the court further noted "this

case presents a conflict between the relator (taxpayer) and the assessor in not only the actual value but the means employed in arriving at it," and concluded that "we are unable to say that the assessor acted arbitrarily, capriciously or discriminatorily, and, therefore, the judgment is not erroneous." The burden is on persons complaining of the assessments in the several counties, or any of them, wholly or partly within the boundaries of the southern and central Florida flood control district, and contending that the valuations of the taxable properties are much below and in violation of legal requirements, to point out and prove such under valuations.

Noteworthy is the recent decision of the Florida supreme court in *McNayr v. DuPont Plaza Center, Inc.*, Fla. 166 So.2d 142, where it was held that the valuations there complained of had been made on the basis of 50% of full cash or just value, and issued its pre-emptory writ of mandamus requiring that all valuations on the tax roll be doubled. It appears its conclusion of assessments on the basis of 50% of full cash or just value was based on the testimony of the county assessor of taxes that he arrived at the taxable value of the properties on his tax rolls by determining the full cash or just value of such properties and taxing $\frac{1}{2}$ of such value as the valuation for purposes of taxation.

Section 196.16, F. S., provides that "the comptroller shall have authority to bring and maintain such actions at law or in equity by mandamus or injunction, or otherwise, to enforce the performance of any duties to the officer or official performing duties with relation to the execution of the tax laws of the state, or to enforce obedience to any lawful order, rule, regulation or decision of the comptroller lawfully made under the authority of these tax laws."

This section of the statutes does not vest the comptroller with authority to take over the tax assessing duties of a county assessor of taxes or to sit as an equalization board in lieu and in place of the boards of county commissioners. It does not authorize the comptroller to enforce his views of full cash or true value of the taxable property of a county where there is an honest difference of opinion between him and the assessor of taxes, or county board of tax equalization, as to what is the full cash or just value of a parcel or parcels of taxable property in a county. Nor does this section contemplate any appraisal of properties by the comptroller as a predicate to action under §196.16. This law does contemplate action by the comptroller where it is obvious that the assessor is not complying with the constitutional mandates and legislative pronouncement relating to taxation of property.

The comptroller, in reaching such conclusion, may rely on facts of all kinds including the railroad assessment board assessment levels and other surveys which he might have available.

The supreme court, in *Green v. Walter*, Fla., 161 So.2d 830, recognized the right of the comptroller to proceed under §196.14, F. S., to require a tax assessor who, by his own admission, first ascertained the full cash value of taxable intangible personal property and then used 42% of that value as his valuation for tax purposes. Although brought by a taxpayer, *McNayr v. State ex rel. DuPont Plaza Center, Inc.*, Fla. 166 So.2d 142, involved a like circumstance in connection with the assessment of real and tangible personal property, where the assessor of taxes testified that he first determined the full cash value of the taxable property and then used 50% of that value for his assessed value for tax purposes.

The comptroller may bring such a proceeding as to real and tangible personal property where like conditions exist as to the determination of just value and the assessment is made on the basis of a percentage of that value. The comptroller should not take over from the tax assessor the initial valuation of properties for purposes of taxation through a proceeding under said §196.14, where there is a dispute merely on what is full cash or just value of a particular parcel of property. The comptroller should not proceed under said §196.14 in order to determine such full cash or just value merely because there is a dispute between the tax assessor and one or more taxpayers but only where it can be shown that there is a general pattern of disobedience to constitutional mandate and statutory requirements.

The Florida legislature, by §§192.31, 193.03, 193.29, 193.39, 193.40, 196.14, 196.16, and other provisions of the Florida Statutes, has imposed upon the state comptroller and the state budget commission certain duties in connection with the assessment and collection of ad valorem taxes against real and tangible personal property for county and local purposes of ad valorem taxes. Many of these duties have been carried out by the publication and distribution of the tax manual provided for in §192.31, F. S. These tax manuals direct tax assessments on the basis of full cash or just value and when they were distributed to the assessors of taxes, directed assessments on the basis of full cash or just value, and continue to so direct that all such assessments be made on that basis.

Therefore, in conclusion, it is my opinion that the state comptroller, under the supervision of the state budget commission, is authorized, if not actually directed, to advise the tax assessors and county boards of equalization to impose ad valorem taxes on the basis of the full cash or just value of the properties subject to taxation. This direction or advice may be carried out through letters or other directives and upon the failure of the tax assessors or any of them to heed such direction or advice of the comptroller, at the suggestion or direction of the state budget commission, to proceed by mandamus injunction or other appropriate remedy to enforce the obligation and duty of tax assessors and boards of equalization to impose taxes on the basis of the full cash or just value of the taxable properties.

In Duval County Taxpayers Association v. Ralph N. Walters, presently pending before the circuit court in Duval county, the issues appear to place before the judiciary consideration of the elements used by tax assessors in determining actual cash value or just value. The pendency of that litigation dictates that as to the practical application of the responsibilities imposed upon the comptroller and budget commission, it is my advice that the comptroller or budget commission should not proceed to enforce the legal requirements for taxation equality until such time as the issues in the Duval county tax suit are finally resolved by a court of last resort. The issues in this litigation should assist in the resolution of many of the legal doubts which now exist under the present law.

064-172—December 11, 1964

CRIMINAL PROCEDURE

BAIL PENDING APPEAL FROM ORDER DENYING MOTION
TO VACATE—CRIMINAL PROCEDURE RULE NO. 1

To: Edward M. Booth, County Solicitor, Jacksonville

QUESTION:

Is a petitioner entitled to bond upon the filing of a motion or petition for relief under criminal procedure rule No. 1 in the trial court and if said motion is ruled adversely to the petitioner, is he entitled to bond pending appeal?

I will first discuss the question of whether a person is entitled to bail on appeal from an order denying his motion to vacate. That question has received consideration by 2 different district courts of appeal in Florida and by one federal court of appeals.

In *Gammage v. State*, 154 So.2d 712, it appeared that Gammage filed in the district court of appeal for the third district a motion seeking his release on bail pending his appeal from an order of the trial court denying his motion to vacate under criminal procedure rule no. 1. In denying said motion for bail, said district court of appeal said:

With *certain possible exceptions* not applicable here, a person convicted of crime who seeks release by way of Criminal Procedure Rule No. 1 is not entitled to bail pending appeal from an order of the trial court denying his application. See *Reiff v. United States*, 9 Cir. 1961, 288 F.2d 887, so holding with reference to the corresponding federal procedure. Compare *Ex parte Hyde*, 140 Fla. 494, 192 So. 159. (Emphasis supplied.)

(The Gammage case was cited as authority by the district court of appeal for the second district in *Simmons v. State*, 163 So.2d 888.)

I note with interest that the foregoing quotation concludes with "Compare *Ex parte Hyde*, 140 Fla. 494, 192 So. 159," and that in *Ex parte Hyde*, the supreme court of Florida said (p. 161 of 192 So.):

Bail is allowable before conviction, but *thereafter* the allowance of bail is discretionary and *allowable only in cases bailable according to the course of the common law or the statutes*. Constitution, Declaration of Rights, Section 9; Section 8467, C.G.L., *Stalnaker v. State*, 126 Fla. 407, 171 So. 226; *Ex parte McDaniel*, 86 Fla. 145, 97 So. 317. (Emphasis supplied.)

(Bail pending appeal from an order denying a motion to vacate was unknown to the common law for the reason, among others, that the common law did not permit such motions, and such bail is not permitted by any Florida statute.)

Yet, despite the seeming inconsistency between what the supreme court thus said in *Ex parte Hyde* and the district court of appeal's recognition in the Gammage case of the possibility of the existence of certain exceptions to the general rule of law that a person is not entitled to bail pending appeal from an order denying a motion to vacate, the fact is that the said district court did recognize the possibility that certain exceptions to the general rule

might exist and that it cited a federal case, *Reiff v. United States*, as authority for doing so.

It will be noted that in the above quotation from its opinion in the Gammage case, the district court of appeal for the 3rd district cited the case of *Reiff v. United States*, 288 Fed.2d 887, as authority for the proposition that "with certain possible exceptions" a person is not entitled to bail pending appeal from an order denying his rule 1 motion to vacate. The *Reiff* case involved a motion which the federal district court treated as a motion to vacate under §2255, Tit. 28, U.S.C., (after which Florida Criminal Procedure Rule No. 1 was patterned). On appeal from an order denying the motion, *Reiff* applied to the appellate court, the United States court of appeals for the 9th circuit, for bail pending appeal. The said court of appeals denied the motion for bail and said:

Except in some exceptional circumstance such as existed in Tinkoff v. Zerst, 10 Cir., 80 F.2d 464, a person convicted of crime who seeks release by way of a section 2255 or habeas corpus proceeding is not entitled to bail pending appeal from an order denying such an application. Examination of the record herein fails to disclose circumstances of an exceptional nature such as were dealt with in the Tinkoff case. (Emphasis supplied.)

It thus appears that the *Reiff* case, upon which the district court of appeal relied in the Gammage case, which Gammage case was cited in the *Simmons* case, mentions "some exceptional circumstance such as existed in *Tinkoff v. Zerst*, 10 Cir. 80 F.2d 464." The said *Tinkoff* case had nothing to do with a motion to vacate under §2255 of Tit. 28, U.S.C. It was a habeas corpus case which was decided years before §2255 was enacted.

Further, the *Tinkoff* case was truly one of "exceptional circumstances." While appealing to the United States circuit court of appeals for the 7th circuit from his conviction in an Illinois federal court, he was improperly hustled off to a penitentiary, where he was unable to obtain counsel to properly perfect his appeal and was not permitted the necessary time and facilities to do so himself. After his appeal was dismissed, he sought a writ of habeas corpus in a Kansas federal court and then appealed from the order denying habeas corpus to the United States circuit court of appeals for the 10th circuit. Under the "exceptional circumstances" of the case, the last-named circuit court of appeals ordered that *Tinkoff* be released on bail for 40 days in order that he might have a fair opportunity to obtain relief from the Illinois federal court or the circuit court of appeals for the 7th circuit.

The *Tinkoff* case having been a habeas corpus case, I think that it furnished, at best, an extremely dubious support for the *Reiff* decision, upon which the Gammage case relied. In fact, it appears to me that it furnished no support at all, not even indirectly, for the district court's reliance on the *Reiff* case in the Gammage case if any credit is to be given to the above-quoted pronouncement of the supreme court of Florida in *Ex parte Hyde*.

I have found no case, either state or federal, in which any court ever actually allowed bail to a person appealing from the denial of a motion to vacate, and it is my opinion that the law does not authorize the allowance of bail to such a person under any circumstances. However, even if the implications of the *Reiff* and Gammage opinions should be regarded as authorizing bail to such a person, under any circumstances, it should not be allowed in the

absence of exceptional circumstances such as were shown to exist in the Tinkoff case.

I have found no state or federal case dealing with the question of whether a person filing a motion to vacate is entitled to be released on bail. It is my opinion that such a person should not be allowed bail under any circumstances pending the disposition of his motion to vacate. However, even if the questionable implications of the opinions in the Reiff and Gammage cases be applied by analogy to a person who has filed a motion to vacate but who has not obtained a decision thereof, bail should not be allowed in the absence of exceptional circumstances such as those that existed in the Tinkoff case.

064-173—December 11, 1964

LEGISLATURE

LEGISLATIVE JOURNALS AND RECORDS—ENTRIES AND INFORMATION REQUIRED—§§12, 17, 21, ART. III, §§1, 2, 3, ART. XVII, STATE CONST.

To: *Edwin G. Fraser, Secretary of the Senate and Lamar Bledsoe, Chief Clerk, House of Representatives, Tallahassee*

QUESTIONS:

1. Should the journals of the senate and house of representatives show joint resolutions in full at each reading, or may the journals show them by title only, except on final passage by the respective houses?

2. Upon the passage of a local bill, or a general bill of local application, by unanimous vote, should the journals reflect the votes by names or may the journals show the yeas and nays votes by totals only?

3. In messages transmitted between the two houses, concurring in amendments, should the amendments be shown in full or may they be indicated by number or numbers?

4. With particular reference to general appropriations bills, is it necessary for amendments constituting an entirely new bill to be shown in full; and,

5. Is it necessary to show such amendments in full when it is transmitted to the other house?

"Each House shall keep a journal of its own proceedings, which shall be published, and the yeas and nays of the members of either house on any question, shall, at the desire of any five members present, be entered on the journal." (§12, Art. III, State Const.). "The vote on the final passage of every bill or joint resolution shall be taken by yeas and nays, to be entered on the journal of each house." (Emphasis supplied.) (§17, Art. III, State Const.) Section 21, Art. III, State Const., relates to the enactment of local and special acts, requiring that notice of an intention to apply for local or special legislation be published as required therein, unless the proposed act be submitted to a referendum as is also provided in said §21. Where such notice is published, in lieu of submission to a referendum, said §21 requires that "the evidence that such notice has been published shall be established in the Legislature before such bill shall be passed . . . and the fact that such notice was

established in the Legislature shall in every case be recited upon the journals of the Senate and of the House of Representatives . . ." Under §§1, 2, and 3, Art. XVII, State Const., relating to constitutional revision and amendments, where an amendment or revision is agreed to in accordance with the applicable section, such fact is required to be entered in the journals of each house with the yeas and nays thereon. These sections in Art. XVII, State Const., relate to constitutional amendments and not to legislation as such.

In advisory opinion, 152 Fla. 547, 12 So.2d 582, text 584, the justices, after referring to the provision in §12, Art. III, State Const., requiring the entry on legislative journals of "the yeas and nays of the members of either house on any question . . . at the desire of any five members present," advised the governor "that if the journal entries show the title in full at the time of introduction, at the time it was received by the House other than that in which it originated, and at the time of its final passage, the requirement of Section 12 of Article III of the Constitution is fully complied with." However, the court further remarked that "a different rule would apply to proposed constitutional amendments," they being governed by Art. XVII, State Const. It is stated in substance in this advisory opinion that except as required by the State Const., "the contents and publication of the journal may be governed by rule and thereby enlarged or abbreviated within the discretion of either house." It is stated in 81 C.J.S. 957, §41, that "except as otherwise provided by the constitution, the contents and publication of the journal may be governed by rule and thereby enlarged or abridged within the discretion of either house." In 49 Am. Jur. 255, §37, it is stated that "the manner of recording the proceedings and the extent of the fullness of the record are left to the discretion of the legislative bodies, or by statute, except as to matters required by the constitution to be recorded."

It is stated in 1 Cooley's Constitutional Limitations, 8th Ed., 290, that constitutional requirements for yeas and nay votes, and the recording of such votes "do not apply to a vote of the house which originated the bill when concurring in amendments of the other house." In 82 C.J.S. 70, §44, it is stated that the votes "on the concurrence in amendments made by the other house, is not the voting on the final passage of the bill such as to require the taking of the yeas and nays as on final passage, at least where the amendments are immaterial, or are only of trivial nature, such as correcting tautology." These provisions seem to contemplate that yeas and nays be taken and recorded when the amendments to be concurred in are material amendments and not amendments of an immaterial or trivial nature. Some cases seem to draw a distinction between the concurrence in informal amendments that make no material change in the substance of the bill amended and those which make material change in the bill as amended.

The requirements in §17, Art. III, State Const., are that *every bill* shall be read by its title on first reading, unless two-thirds of the members present desire it to be read by sections; *every bill* shall be read on three several days, unless such reading is dispensed with by two-thirds of the members present; and that *every bill* shall be read section by section on second reading unless such reading is dispensed with in the manner provided. It is here noted that no reference is made in said §17, Art. III, to joint resolutions until we reach the provision in said section that "the vote

on the final passage of every bill or joint resolution shall be taken by yeas and nays to be entered on the journal of each house," the reference prior to the quoted language being to bills only.

The justices, in advisory opinion, 152 Fla. 547, 12 So.2d 582, text 584, advised that "... if the journal entries show the title in full at the time of introduction, at the time it was received by the House other than that in which it originated, and at the time of its final passage, the requirement of Section Twelve of Article Three of the Constitution is fully complied with." Under §17, Art. III State Const., "the vote on the final passage of every bill or joint resolution shall be taken by yeas and nays to be entered on the journal of each house." We find no constitutional or statutory requirement that the vote on the first and second readings of bills and joint resolutions be taken by yeas and nays and be entered on the journal of each house; this may be governed by the rules of the respective houses. However, should as many as five members of either house demand a yea or nay vote and that the same be recorded in the journal of either house, such a vote must be taken and recorded in the journal.

Questions 4 and 5 relate to journal entries of amendments to bills by the striking of a large part of a bill or a section or sections thereof and substituting new matter in lieu of the stricken matter. It is stated in 82 C.J.S. 59, §34, that "in the absence of a constitutional requirement it is not essential that the journal of the house should show the adoption of an amendment. A requirement that each house shall keep a journal of its proceedings does not require that entries be made of every action taken on proposed amendments. However, a provision that no amendment to bills shall be adopted unless the amendment shall be entered at length on the journal of the house in which it is adopted must be observed, but it is a sufficient compliance if the amendment only is recorded, it not being necessary that the bill as amended shall be published in full in the journal. Also, under such a provision the amendment need be entered only on the journal of the house in which the amendment was offered. A constitutional provision that an amendment to a bill by one house shall not be concurred in by the other, unless a vote be taken by yeas and nays, and the names of the members voting for and against it to be recorded at length on the journal, requires the journal of the other house to show only a concurrence in the amendment and not a vote on the entire bill in its entirety." There is no requirement in the State Const., nor in the practice of the Florida legislature, requiring that bills of the legislature upon introduction be spread in full upon the legislative journals of the legislature, or upon the journal of the house in which introduced. We find nothing in the State Const., which appears to require that amendments offered to bills during their course through the legislature be spread upon the journals. There are many legislative records that are not in practice entered in full upon the legislative journals. We know of no provision in the State Const., which prohibits amendment of bills by striking everything after the enactment clause and substituting amendatory language in lieu thereof, so long as a record of such amendment is kept and preserved. There appears to be no prohibition of preserving such an amendment in written form, in substance the same as or like an original bill introduced in the legislature, in the file of the original bill.

In the light of the above and foregoing constitutional provisions and the authorities cited, the above-stated questions are answered as follows:

AS TO QUESTION 1:

There is no constitutional requirement that the journals of the senate and house of representatives of Florida show joint resolutions in full at each reading, so that, unless otherwise provided by rules of the respective houses, the journals may show them by title only, except on final passage by the respective houses, when they should be set out in full in the journals showing the yeas and nays vote in each such house.

AS TO QUESTION 2:

From the authorities considered by us, we are of the opinion that the requirement that "the vote on final passage of every bill or joint resolution shall be taken by yeas and nays, to be entered on the journal of each house," means and intends a duly recorded roll call vote, and includes passage by a unanimous vote; journal entries showing the yeas and nays by totals only, do not appear to meet the constitutional requirements.

AS TO QUESTION 3:

Messages transmitted between the two houses, concurring in amendments, need not, where the amendments are immaterial or only trivial in nature, show the same in full, but may identify the same by number or numbers, but where the amendment is a material one, then a yeas and nays vote should be taken and a journal record thereof made.

AS TO QUESTION 4:

With particular reference to general appropriations bills, it does not appear that amendments constituting an entirely new bill be spread in full upon the journal of either house, so long as the amendment is preserved substantially as bills introduced into the legislature are preserved. Entries similar to those made concerning original bills may be made concerning such amendments.

AS TO QUESTION 5:

It does not appear necessary to show such amendments in full, when transmitted to the other house, if the original bill, had it not been amended, would not have been required to have been shown in full.

064-174—December 11, 1964

COUNTY

COUNTY OFFICERS—MOSQUITO CONTROL DISTRICT COMMISSIONERS—COMMISSIONS PREREQUISITE TO FUNCTIONING—CH. 388, §§388.131, 388.141, 122.02, F. S.; §7, ART. VIII, STATE CONST.; CHS. 59-195, 63-236, LAWS OF FLORIDA

To: Ernest Ellison, State Auditor, Tallahassee

QUESTION:

Are the east Duval county mosquito control district commissioners required to be commissioned by the governor; if so, are such commissions absolutely prerequisite to the performance of the functions of the office?

The east Duval county mosquito control district was organized

under former Ch. 390, F. S. This was subsequently repealed by Ch. 59-195 which reenacted certain provisions of Ch. 390 and the law relating to mosquito control districts now appears as Ch. 388, F. S. This in turn was amended by Ch. 63-236, which provides for the election of members of a district board of commissioners and states that the 3 persons receiving the highest number of votes cast in the general election shall serve 4 years and "shall take office at the same time as do other county officers on the first Tuesday after the first Monday in January next after their election and serve on the same cycle as do other constitutional county officers."

In seeking a definition of whether commissioners of the east Duval county mosquito control district are county officers, we referred to §122.02, F. S., which, for the purpose of qualifying certain officers and employees who are qualified for admission to the state and county retirement system contains these words:

'State and county officers and employees' shall include all full time officers or employees who receive compensation for services rendered from state or county funds, or from funds of drainage districts or *mosquito control districts* of a county or counties. . . . (Emphasis supplied.)

Each member of the board of commissioners of such a mosquito control district is paid \$5 a day for each day's service, up to \$300 during any one year. Section 388.141, F. S.

Also each commissioner, before he assumes office, is required to give a good and sufficient surety bond to the governor in the sum of \$2,000, conditioned on the faithful performance of the duties of his office, such bond to be approved and filed in the same manner as is that of the board of county commissioners. The failure of any person to make and file this bond within 10 days after his election shall create a vacancy on said board. (§388.131, F. S.)

I am of the opinion that each member of the board of commissioners of the east Duval county mosquito control district is a county officer, acting in an agency, instrumentality or adjunct of Duval county, which functions for and serves the county in its capacity as a subdivision of Florida.

Section 7, Art. VIII, State Const. reads in part as follows:

All county officers, except assistant assessors of taxes, shall, before entering upon the duties of their respective offices, be commissioned by the Governor; but no such commission shall issue to any such officer until he shall have filed with the Secretary of State a good and sufficient bond, in such sum and upon such conditions, as the Legislature shall by law prescribe, approved by the county commissioners of the county in which such officer resides, and by the Comptroller.

The requirement for a bond to be given by each of these commissioners is set out in §388.131, F. S. I call your attention again to the fact that "the failure of any person to make and file this bond within ten days after his election shall create a vacancy on said board."

From the above and from statements of the supreme court of Florida on such matters, such county officers as the commissioners of the east Duval county mosquito control district must be commissioned by the governor (In Re advisory opinion to the governor, 92 Fla. 989, 111 So. 252), and until such county officer has filed

his bond with the secretary of state and has been commissioned by the governor, he is not legally qualified to perform the functions of the office. See AGO 043-19, biennial report of 1943-1944.

Accordingly, your question is answered in the affirmative as to both parts.

064-175—December 11, 1964

CHIROPRACTORS

AUTHORIZED TO SIGN DEATH CERTIFICATES—\$460.23, F. S.

To: *Raymond C. Schneider, President, Florida Board of Chiropractic Examiners, Clearwater*

QUESTION:

Are licensed chiropractors authorized to sign death certificates?

In view of the statutory authority contained in §460.23, F. S., which specifically provides that licensed chiropractors, "sign death certificates and comply with all laws pertaining to public health," your question is answered in the affirmative.

064-176—December 11, 1964

NEIGHBORHOOD YOUTH CORPS

SUPERVISION OF ENROLLEES—HANDLING OF FEDERAL FUNDS CONTRIBUTED—§§9 AND 13, ART. XII, STATE CONST.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

STATEMENT OF FACT:

Under the provisions of a neighborhood youth corps project the county board of public instruction will employ and supervise all enrollees. These youth will be assigned to specific jobs and will be paid by the county board in accordance with a specified wage scale for the time they work. During the time the person is not working, he will be enrolled part-time or full-time in some type of educational program. In order to carry out the neighborhood corps program, the federal government will provide up to 90% of the funds and the school board will provide the additional amount either in cash or the equivalent in services. In the light of these facts, please give legal advice on the following questions:

QUESTIONS:

1. Would these federal funds become a part of the county funds as provided in §9, Art. XII, State Const.?

2. Would the provisions of §9, Art. XII, State Const., preclude the use of such funds to subsidize a work-training program by assignment of enrollees to a nonprofit agency such as a board of county commissioners, city commissioners, welfare agency, YMCA, church organization, or similar type organization provided such work is supervised by employees of the county board?

3. If such funds may not be used to subsidize a work-training program, how may such funds be used and be within the meaning of §9, Art. XII, State Const.?

It is my opinion that the federal funds in question when paid to the county school board would become a part of the county school funds as provided by Art. XII, §9, State Const.

They would therefore have to be expended by the county school board and could not be turned over as a subsidy to other agencies.

I suggest that the board could contract with other government agencies or corporations if they are legal entities or with the individuals to perform the necessary educational functions required by the board to carry out the program provided.

This assumes compliance with Art. XII, §13, State Const., which provides:

Restriction on use of county or district school funds.—

No law shall be enacted authorizing the diversion or the lending of any County or District School Funds, or the appropriation of any part of the permanent or available school Fund to any other than school purposes; nor shall the same, or any part thereof, be appropriated to or used for the support of any sectarian school.

064-177—December 14, 1964

SALE OF SECURITIES

DEFINITION OF SECURITIES—§517.02; CH. 517, F. S.

To: *W. L. Norred, Assistant Director, Florida Securities, Commission, Tallahassee*

QUESTION:

Does the performance guarantee which is being offered by Florida Peach Orchards, Inc., as part of a land sales contract fall within the definition of a security as set out in §517.02(1), F. S., 1963?

The definition of a security as found in §517.02(1), F. S., 1963, is very broad and sweeping in that virtually every type of investment program is included within the section. The definition of a security in §517.02(1), F. S., 1963 is as follows:

(1) 'Security' shall include any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation, whiskey warehouse receipt, or right to subscribe to any of the foregoing; certificates of interest in a profit-sharing agreement, or the right to participate therein; certificate of interest in an oil, gas, petroleum, mineral or mining title or lease, or the right to participate therein; collateral trust certificate, preorganization certificate, preorganization subscription, or any transferable share, investment contract, or beneficial interest in title to property, profits or earnings; interests in or under a profit-sharing or participation agreement or scheme, or any other instrument commonly known as a security, including an interim or temporary bond, debenture, note, certificate or receipt for a security or for subscription to a security.

The Florida supreme court, in *McElfresh v. State*, 9 So.2,

277, 278, 1942, has said, with reference to the definition of a "security," that:

Of necessity no definition of a security can be given to fit all cases. The thing sold will in each case be examined to determine if it falls within the purview of the statute.

Often it is necessary to go outside the instruments which the promoters are offering to investors to determine whether a "security" has been issued. This is especially true in cases where there is a question as to whether one of the general or "catch-all" securities such as "investment contract" has been issued.

From the facts you have submitted to me, it is my understanding that the corporation here involved offers an investor the opportunity to purchase small parcels of land in Florida by warranty deed. The purchaser is bound to keep the land in cultivation for peaches for a period of 12 years, and for the first 2 years he is bound to a management agreement whereby the corporation will cultivate, maintain and manage said land. The purchaser receives a percentage of the profits on the total amount of peaches which the corporation harvests from the land of *all* the purchasers. After the said 2-year period, the purchaser is offered an option to continue to allow the corporation to cultivate and manage his land or to perform these services himself. All of these terms are incorporated within a "performance guarantee" which is part of the transaction involved.

It is my opinion that the legal issue in this matter turns upon a determination of whether, under the circumstances, the land sales contract, the warranty deed and the performance guarantee together constitute an "investment contract" within the meaning of §517.02-(1), F. S., 1963. An affirmative answer brings into operation the registration requirements of Ch. 517, F. S., 1963, unless the security is granted an exemption under the said chapter. An affirmative answer also brings into operation the penalty sections of the Florida securities law.

The old common law rule of strict interpretation of regulatory and penal statutes, which would require a strict interpretation of the term "investment contract" does not apply to the Florida securities law (Ch. 517) because of the legislative intent behind this law which is commonly called the "blue sky law." This intent was recognized by the Florida supreme court in *McElfresh v. State*, supra, wherein the court stated as follows:

Statutes of this character are upheld under the police power of the State. Their purpose is to protect the public against fraud and the statute will be given a broad and liberal interpretation to effectuate the purpose.

There is no specific definition of the term "investment contract" within the body of the Florida securities law, so we must look to court decisions for an interpretation of the term. One of the first, and most important cases construing "investment contracts" was *State v. Gopher Tire and Rubber Co.*, 177 N.W. 937, 1920.

In holding that the certificates and representations there involved constituted an "investment contract" the court said at p. 938:

No case has been called to our attention defining the term 'investment contract.' The placing of capital or laying out of money in a way intended to secure income or profit from its employment is an investment. If defendant issued and sold certificates to purchasers who paid their money

justly expecting to receive an income or profit from the investment, it would seem that the statute would apply. The statute makes specific mention of stock, which, properly speaking is not a security, and follows the enumeration of investments which fall within its scope with the words herein called securities, indicating that the legislature has not used the term securities in a literal, but in a broad sense. In that sense, these certificates may properly be regarded as 'investment contracts' or 'securities.' The mere fact that defendant has studiously maintained that they are not does not require a court to hold that they are something else.

The leading case on the interpretation of the definition of a security is *S.E.C. v. W. J. Howey Co.*, 328 U.S. 293, 1946, in which the U.S. supreme court, based on facts very similar to the subject of the opinion, held that the sale of units of a citrus grove development in Florida, coupled with a contract for cultivating, marketing and remitting the net proceeds to the investor, was the sale of a security. The court stated on p. 298 that the test as to whether or not a "security" was involved is as follows:

In other words, an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.

Although the *Howey* case was based on the federal securities act, the definition of a security in the Florida and federal acts is substantially the same. The Florida courts have given the definition of a security a broad interpretation in line with *Howey* and there is no reason to expect that the type of interpretation will change.

From the facts you have presented me and based on the court decisions cited herein, it is my conclusion that the "performance guarantee" issued by Florida Peach Orchards, Inc., in its operations is an investment contract within the meaning of §517.02(1), F. S., 1963. It involves the investment of money in a common enterprise, with profits for the first two years of the agreement to come solely from the efforts of others. This conclusion is not affected by the fact that after the initial binding 2 year period the investor has an option not to accept the management services of the corporation. Chapter 517, F. S., 1963, prohibits the offer, as well as the sale, of unregistered, nonexempt securities (see §517.02(3)). After the initial 2-year period, the investor in this matter is offered an opportunity to continue under the management of the promoters.

As you know, the case of *State v. Hemphill*, 195 So. 915, 1940, involving similar facts held that a security was not involved. It is my opinion that this case can be distinguished because:

1. It was strictly limited to the facts of that case.
2. The instrument used was very different from the one here involved.

3. A liberal interpretation has been put on the definition of securities by the courts in cases later than *Hemphill*.

It is my opinion that on the basis of the foregoing, your question is answered in the affirmative.

064-178—December 14, 1964

TAXATION

CONSTRUCTION OF PROVISIO ADDED TO §7, ART. X,
STATE CONSTITUTION—§9, ART. IX, §§8 AND 10,
ART. XII, STATE CONST.*To: Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. How should the \$2,000 of assessed value of homestead property be assessed for taxes under §7, Art. X, State Const., as amended in 1964, and under what limitations, if any?

2. Does said §7, Art. X, State Const., as amended in 1964, in any way affect the exemptions provided for in §9, Art. IX, State Const.?

The following proviso was added to §7, Art. X, State Const., between the reference to "the year 1939 and thereafter" and the phrase that "said title may be held by the entireties," to wit, "provided that in Sarasota County the first two thousand dollars of the assessed value of such property shall be taxable for school purposes only and the exemption shall apply to the next five thousand dollars for school purposes only of the assessed valuation." This is clearly a proviso and should be construed as such. A strict but reasonable construction is to be given to a proviso so as to take out of the enacting clause only those cases which are fairly within the terms of the proviso. The operation of a proviso is usually and properly confined to the portion or part of the enactment which immediately precedes it, or to which it pertains, and does not extend to or qualify other portions of the statute, unless there is a clear legislative intent to do so. (82 C.J.S. 884-888, §381; 30 Fla. Jur. 232 and 233, §§127 and 128).

We find in the said §7, Art. X, State Const., as amended in 1964, or in the proviso added by the amendment, no purpose or intention to change or interfere with §9, Art. IX, State Const., or any other section or part of said Art. IX. The purpose of the proviso appears to have made the first \$2,000 of the value of the homestead subject to school taxes, without interfering with the exemption as to all other taxes. As to taxes, other than "school taxes," the first \$5,000 of taxable value remains subject to the homestead tax exemption. The school taxes are imposed on the first \$2,000 of value with the exemption attaching to the next \$5,000 of value; the first \$5,000 of value is exempt as to all taxes other than school taxes, which may be imposed on the first \$2,000 of taxable value. We are inclined to the view that "school taxes" as used in the amendment, has reference to those taxes mentioned in §§8 and 10, Art. XII, State Const.

From these observations we conclude that:

AS TO QUESTION 1:

The proviso added to §7, Art. X, State Const., at the general election in 1964 permits the imposition of school taxes on only the first \$2,000 of value of homesteads in Sarasota county, and the exemption on the next \$5,000 of value. As to all other taxes, the homestead tax exemption is on the first \$5,000 of value of the homestead.

AS TO QUESTION 2:

Section 7, Art. X, State Const., as amended in 1964, in no way affects the exemptions provided for in §9, Art. IX, State Const.; this exemption should be handled in the usual manner. We find nothing subrogating this exemption to the school taxes mentioned in the 1964 amendment of §7, Art. X, State Const.

We realize that this construction of the said 1964 amendment may present some tax assessing problems; however, such problems should not permit a construction violative of the intent of the people when they adopted the said amendment at the 1964 general election.

064-179—December 15, 1964

FOREIGN CORPORATIONS

POSTING OF COST BOND BY FOREIGN CORPORATION
REQUIRED IN ADDITION TO COMPLIANCE WITH
CH. 613, F. S.—§§58.01, 613.07, F. S.

To: *Gordon A. Duncan, Jr., Judge, Small Claims Court,
Jacksonville*

QUESTION:

When a foreign corporation has complied with Ch. 613, F. S., does this fact automatically obviate the necessity of such corporation complying with the provisions of §58.01, F. S.?

Chapter 613, F. S., requires a foreign corporation to qualify and receive a permit before it may transact business in this state. In *Ulmer v. First Nat. Bank*, 61 Fla. 460, 55 So. 405, p. 407, the supreme court stated:

It is within the power and duty of the state to prevent imposition or injustice from being practiced within its territory, and to provide for the general welfare of its people.

This case is cited for the purpose of illustrating the policy behind the enactment of Ch. 613, F. S. Section 613.07, F. S., expressly excludes "banking or trust companies incorporated under the laws of any other state, territory or other country," from Ch. 613.

Section 58.01, F. S., provides in pertinent part as follows:

Whenever a complainant or plaintiff, who is a nonresident, shall commence a suit in any of the courts of this state, . . . it shall be the duty of himself, or his agent, or attorney, to file in the court in which said suit is brought a bond with approved security in the sum of one hundred dollars, conditioned for the payment of all costs and charges which may be adjudged against him in said suit; and, upon failure to file such bond and security within thirty days after such commencement, . . . the defendant may, after thirty days notice to the plaintiff or his attorney (during which the plaintiff may file such bond), move to dismiss the suit for want of such security, or may hold the attorney bringing or prosecuting said suit liable for said costs and charges; . . .

The above provision has been construed as having for its practical object the obtaining of an adequate security for court costs

in a suit being prosecuted by a nonresident plaintiff. *Thompson v. Grosslaub*, 109 Fla. 550, 147 So. 861. It, therefore, appears that §58.01, F. S., is a separate and distinct safeguard enacted by the legislature. The purpose of this statute is to assure Florida citizens who might be defendants in suits brought by nonresident plaintiffs a recovery of court costs to which they might be entitled as a result of such suit.

When a foreign corporation has complied with Ch. 613, F. S., it may then maintain a suit in the courts of this state. This is not to say that the necessity for compliance with §58.01, F. S., is thereby obviated for §58.01, F. S., is a separate and distinct provision which is to be satisfied by nonresident plaintiffs.

In the case of *National Net & Twine Co. v. Stevens*, 101 Fla. 810, 135 So. 509, a foreign corporation filed a bond under Comp. Gen. Laws 1927, §4672 (now §58.01, F. S.); however, the bond did not meet the terms of the statute. The supreme court stated at p. 510 of this case that:

On timely motion being made, the court dismissed the suit for failure to file the bond as required. Writ of error was taken to the order dismissing the suit.

The statute has not been complied with. Demand was made by the defendant as is required by the statute, and, after the expiration of thirty days during which time the plaintiff could have conformed to the statute by filing the bond, and after notice to opposing counsel, the motion to dismiss was made and granted.

The court then affirmed the dismissal of the suit.

Consequently, it appears that the mere fact a foreign corporation has complied with Ch. 613, F. S., does not automatically satisfy the requirement imposed by §58.01, F. S.

064-180—December 18, 1964

PUBLIC OFFICERS

OFFICIAL BONDS—NECESSITY TO RENEW, OF HOLD OVER DEPUTY SHERIFF WHEN INCUMBENTS REELECTED

To: *John A. Madigan, Jr., Attorney, Florida Sheriffs Association, Tallahassee*

QUESTION:

Should a deputy sheriff's bond be renewed or extended in writing at the beginning of each new administration even though the incumbent principal was re-elected, and said deputy is a hold over from the previous administration?

The general rule regarding official bonds appears to be:

Where the condition of the bond does not specify the period covered by the bond, recourse may be had to a recital of the bond which states the officer's term of office in order to show the *intention of the parties* that the bond was to cover the stated term of office. (Emphasis supplied.) 80 C.J.S. 427, Sheriffs and Constables, Section 180.

In 4 Fla. Jur. 565, bonds, §36, the following statement is found:

While difficult questions are frequently presented with respect to the duration of bonds insuring fidelity of officers

and employees who are, from time to time, re-elected or reappointed to their office or employment, the primary consideration in determining whether the bond extends over to a subsequent term of employment is the *intention of the parties*. (Emphasis supplied.)

At 50 Am. Jur. 1124, suretyship, §332, it is stated:

Difficult questions are frequently presented with respect to the duration of bonds which insure the fidelity of officers and employees who, from time to time, are re-elected or reappointed to their offices or employments. The object of the court in each case is, of course, to ascertain the intention of the parties in determining whether the efficacy of a bond extends over into a subsequent term of employment.

In regard to whether a bond extends over into successive terms of office the following statement is found in 80 C.J.S. 427, 428, sheriffs and constables, §180:

It has been held that, where a deputy sheriff or constable continues to be such without interruption during successive terms of office of his principal, an official bond given by such deputy does not expire on the expiration of the principal's term but continues as security for defaults occurring in a subsequent term; *but there is also authority for the view that, where an officer takes a bond from his deputy to indemnify him during his continuance in office, such bond refers only to the term of the principal's term then current, and cannot be held to embrace defaults which occur during succeeding term*. (Emphasis supplied.)

In view of the foregoing split of authority as to whether or not a bond extends over into successive terms of office, and the rule that the intention of the parties will determine the period covered by an official bond, it appears that a deputy sheriff should either be rebonded or a signed extension of the bond be obtained at the beginning of each new administration whether the cause be from death, resignation, removal or reelection of the principal.

Your question is answered in the affirmative.

064-181—December 18, 1964

Revision of 064-105—July 28, 1964

TAXATION

TAX EXEMPT STATUS OF LANDS UPON WHICH SPOIL DEPOSIT EASEMENTS HAVE BEEN GRANTED— CHS. 14723 AND 15751, 1931, LAWS OF FLORIDA

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are lands encumbered by spoil disposal easements given by landowners to the United States in connection with the upkeep and maintenance of the Florida inland navigation district entitled to tax exemption for such lands themselves?

The Florida inland navigation district was created and established by Ch. 14723, 1931, embracing lands in Brevard, Broward,

Dade, Duval, Flagler, Indian River, Martin, Nassau, Palm Beach, St. Johns, St. Lucie and Volusia counties. This act provided for a governing board for the said district, set out its powers and authority, and otherwise regulated the administration of the affairs of the district. The primary purpose of this act was to procure an existing canal running from the Georgia boundary to the Miami area in Dade county, and to provide for and furnish rights-of-way, spoil areas, etc., for use by the federal government in connection with its administration, extension and widening of the said canal. In this connection the board is required to "acquire or obtain by gift, donation, purchase or by condemnation and shall furnish free of cost to the United States of America suitable areas for the deposit of dredged material in connection with the work of improving and/or constructing the canal and in connection with the upkeep and maintenance thereof." This authority would seem to include the obtaining of deposit or spoil areas for depositing spoil and dredged materials taken from the right-of-way and from the canal itself in connection with the upkeep, maintenance and expansion of the canal.

In some instances the fee title to spoil areas is obtained and conveyed to the United States, while in other instances leasehold interests or easements are obtained, leaving the fee title vested in the landowner, subject, however, to the lease or easement rights. These leasehold and easement rights are transferred to the United States. In an easement, a copy of which we have been furnished, the owners of the land granted it to the United States for spoil area purposes or right to deposit spoil and dredge materials thereon, commencing Sept. 1, 1963, and ending Aug. 31, 1965. Easements, as well as leasehold interests, appear to be interests in the land upon or concerning which the same are granted. In the instant case the fee title would seem to be vested in the landowner and the leasehold interest or easement in the U. S. or Florida. These are separate properties in the same lands. In *Bancroft Investment Corp. v. Jacksonville*, 157 Fla. 546, 27 So.2d 162, it was held that a parcel of land, sold by the U. S. to a purchaser, under a contract for sale and conveyance, was subject to taxation against the purchaser, to the extent of his right, title or interest in the land, so long as the rights and interests of the U. S. are protected. This appears to have been the view of the U. S. Sup. Ct. in *S. A. R. Inc., v. Minnesota*, 327 U. S. 558, 66 Sup. Ct. 749, 90 L.Ed. 851.

We feel that the fee title to the lands leased or otherwise let by its owner to the U. S., or Florida, for use in the depositing of spoil and dredge material in connection with the upkeep, repair, extension and maintenance of the Florida east coast canal, is subject to ad valorem taxation notwithstanding the interest of the U. S. and Florida therein, unless exempted by reason of Ch. 15751, 1931, which provides for the cancellation and release of ad valorem taxes and tax sale certificates encumbering the canal properties. This provision for the cancellation of county and local ad valorem taxes also extends to municipal taxes. This statute providing for such cancellation of taxes appears to be based on the theory that the state would by such cancellation be relieved of indirect payment of such taxes through charges for the lease of such lands by their owner in an amount sufficient to cover the said taxes, so that such cancellation inures to the benefit of the state.

The above-stated question, by reason of said Ch. 15751, is answered in the affirmative for such period of time as the lands in

question are actually used by the U. S., Florida, or the navigation district, for the purposes of spoil disposal. When no longer so used the lands shall become subject to taxation.

064-182—December 23, 1964

**COUNTY SUPERINTENDENT OF PUBLIC INSTRUCTION
APPOINTED—QUALIFICATIONS—APPOINTING BOARD—
§230.28, F. S.; ART. IV, §7, STATE CONST.**

To: *Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee*

QUESTIONS:

1. In a county in which the county school board has authority to appoint the superintendent of public instruction, must the person appointed be a qualified elector of the county in which he is appointed to serve as a county superintendent?

2. In a county in which the appointive superintendent should assume the duties of office in January, 1965, would the present board of public instruction appoint the superintendent or should such appointment be made by the board following its organization on Jan. 5, 1965?

I find no constitutional or statutory requirement that an appointive superintendent of public instruction must be a qualified elector of the county in which he is to serve at the time of his appointment. Question 2 is therefore answered in the negative. Please note, however, the provisions of §230.28, F. S.:

Vacancy in office of county superintendent.—The office of county superintendent in any county shall be vacant when the county superintendent removes his residence from the county.

As to question 2, the term of an appointed superintendent remains the same as other county officers. *Hancock v. The Board of Public Instruction of Charlotte County*, 158 So.2d 519.

With regard to appointments, the courts have held "a prospective appointment is valid if the Governor who makes the appointment is still in office at the time the vacancy occurs and the commission becomes effective." *Tappy v. State, Fla.*, 82 So.2d 161 at 166. The "... power of appointment cannot be exercised to fill an ... office unless the office be deemed vacant under the law." *Gray v. Bryant, Fla.*, 125 So.2d 846. This case does not appear to apply in your question since the office is not vacant. Furthermore, apparently this decision applies only to elective offices. It would seem therefore that even though a vacancy did occur prior to Jan. 5 the present board could only make an appointment to fill the position until the present term of office of the superintendent expires on Jan. 5. (Art. 4, §7, State Const.)

It is therefore my opinion that the appointment of the school superintendent in question to fill the position beginning Jan. 5, 1965, should be made by the new board which takes office on the same date.

064-183—December 29, 1964

COUNTY FUNDS

DEPOSIT IN FEDERAL AND STATE SAVINGS AND LOAN ASSOCIATIONS—§§665.44, 125.31, F. S.

To: Ernest Ellison, State Auditor, Tallahassee

QUESTION:

May funds of boards of county commissioners be invested in federal and state savings and loan associations?

In AGO 063-41 which deals with the statutory basis for investments under §665.44, as amended by Ch. 63-162, it was noted that:

From the above and foregoing it appears that under the federal statutes providing for federal savings and loan associations and the Federal Savings and Loan Insurance Corporation, that the investment of state, county, municipal and district funds in share accounts of the federal savings and loan associations are *clearly contemplated and provided for*. (Emphasis supplied.)

In addition, the liquidity of investments in federal savings and loan associations was recognized in *Potter v. Aetna Casualty Co.*, 370 U. S. 159. In that case the U. S. Sup. Ct., while recognizing that moneys placed with federal savings and loan associations were in essence investments, the court held that they were of such nature and had such liquid characteristics that guardianship trust funds could be placed in such financial institutions.

Apparently, the conflict between the provisions of §665.44, F. S., as it existed prior to the 1963 amendment, which were considered in AGO 054-17 and the present provisions of §665.44, F. S., as amended to include the additional proviso, to wit:

Provided that the investments authorized in this section are limited to the extent that the same are insured by the federal government or an instrumentality thereof.

gives rise to your question. In AGO 054-17, it is noted that:

Chapter 17906, Laws of Florida, 1937 (Section 665.44, Florida Statutes) empowers the board of county commissioners to invest in investment share accounts of the saving associations designated therein irrespective of any guarantee of their obligations by the federal government. The later act, Chapter 21691, Laws of Florida, 1943 (Section 125.31, Florida Statutes) authorizes investment only '... in negotiable direct obligations of, or obligations the principle and interest of which are unconditionally guaranteed by the United States government in the prevailing market price for such security.' It is possible for a building or savings and loan association to become a member of the Federal Deposit Insurance Corporation, which insures accounts or deposits up to \$10,000. However, I do not feel the shares of these associations are within the purview of Section 125.31, Florida Statutes. They are not the type of obligations contemplated by the statute for they are neither negotiable nor 'such security,' contemplated by the section. Paragraph (3) contemplates that the securities be sold

by the county when the funds are needed, Shares of the associations are not negotiable.

Until a court of competent jurisdiction says otherwise, I am of the opinion that the county's investment of surplus public funds is limited to those securities within the meaning of said Section 125.31, Florida Statutes.

Chapter 63-162 became effective May 23, 1963. Hence, when compared with the 1943 effective date of Ch. 21691, (§125.31, Ch. 63-162, §665.44, F. S., is clearly the latest expression of the legislature on the subject of the investment of county funds.

Where statutes in *pari materia* are fairly susceptible of two constructions, one of which will give effect to both, and others of which will defeat one or both, former construction is preferred. (State ex rel. Ashby v. Haddock, 140 So.2d 631, reversed 149 So.2d 552).

Inasmuch as the proviso of §665.44, F. S., is the latest expression of the legislature on the subject of investment of public funds in share accounts of savings and loan associations, it would appear by implication to authorize the investment of county funds in such accounts to the extent that same are insured by the federal government or an instrumentality thereof. The question presented is answered in the affirmative subject to the above qualifications.

064-184—December 30, 1964

CRIMINAL PROCEDURE

FINE AND COST BOND—SURRENDER OF DEFENDANT BY SURETY—PERIOD OF IMPRISONMENT— §§921.15, 951.16, F. S.

To: *M. H. Bowman, Sheriff, Sumter County, Bushnell*

QUESTIONS:

1. Can the surety maker of a fine and costs bond surrender a defendant prior to the maturity date of such bond and thereby relieve himself of the bond obligation?

2. If the answer to question 1 be in the affirmative, does the defendant who has been so surrendered, then have to serve the term of imprisonment given as an alternative to the paying of the fine in the same manner as if the fine and costs bond had never been filed?

3. Does the term of imprisonment under such conditions begin the day defendant is returned to custody by the surety?

With regard to question 1, a discussion of the rules applicable to appearance bonds will be of assistance in arriving at the correct answer. In the case of *Register v. Barton*, 75 So.2d 187, the Sup. Ct. of Florida, speaking through Justice Thomas, specified that under the law of this state a surety on bail bond could arrest and surrender the principal at any time before default and thereby remove the appearance bond obligation.

8 C.J.S., Bail, §87, p. 240, reveals that even though a surety may, under some circumstances, have the legal right to remove his bond obligation to the state by premature surrender of the defendant, such surrender may nevertheless give rise to a cause of action by the defendant against the surety. Such cause of action could result

in an award of damages to the defendant of an amount which would at least be equivalent to the bond premium.

8 C.J.S., Bail, §87, p. 239, and cases cited thereunder, provide extensive authority for the proposition that a surety of a fine and costs bond does not have the right to remove the bond obligation by surrendering the defendant. The rationale of such holding is that the obligation of a surety under the fine and costs bond is related solely to assuring the state that the fine is paid, rather than having any relationship to the incarceration or appearance of the defendant.

At this point we would ordinarily have to conclude that a surety could not remove the obligation to pay a fine and costs bond by surrendering the defendant. However, in the case of *Carver v. State*, 183 So. 719, the Sup. Ct. of this state specifically held that the obligation to pay a fine and costs bond would be removed by the defendant's surrendering *himself* for the purpose of serving the alternative term of imprisonment.

In the recent case of *Bryan v. State*, 156 So.2d 885, (1963), the district court of appeal of the second district recognized the right of a surety to obtain remission of a forfeited fine and costs bond by surrendering the defendant after the date of forfeiture. The rationale of the lower court, which paralleled the C.J.S. rationale (that the surrender of the defendant did not satisfy the fine obligation inherent in a fine and costs bond), was rejected by such appellate court. It may be suggested that this case only held that the lower court had discretion to remit a forfeited fine and costs bond where the defendant is surrendered by the bondsman; however, a close scrutiny of such case reveals that the discretion discussed is one which must be exercised within the limits of judicial reasonableness. Where the circumstances surrounding the factors discussed by the opinion of the appellate court favor remission, the bondsman is not accountable after surrendering the defendant. It is therefore clear that under some circumstances, the bondsman may satisfy the obligation of a fine and costs bond by surrendering the defendant after forfeiture; *a fortiori* the bondsman can *always* satisfy the obligation of a fine and costs bond by surrendering the defendant before forfeiture. It thus appears that Florida does not follow the rule set out by C.J.S., and, to the contrary, permits a bondsman to remove the obligation of even a fine and costs bond by surrendering the defendant at any time before default. (The defendant may under some circumstances have a civil remedy against the bondsman). Your first question is thereby answered in the affirmative.

This conclusion is distinguishable from that reached in AGO 063-19, which simply held that where the defendant commenced serving a term of imprisonment which was unrelated to the fine and costs bond, such action did not relieve the surety from paying the obligation of the bond. It is noted, however, that this conclusion is in direct conflict with that found in AGO 057-184, and therefore the conclusion of that opinion, as adverse to the instant opinion, is overruled. Such former attorney general opinion did not have the benefit of the judicial ruling set out in the 1963 case of *Bryan v. State*, *supra*.

With regard to question 2, §921.15, F. S., contemplates the issuance of only the fine and costs bond. The bond authorized by such section is one which must be made payable within 90 days

from the date of issuance. It is quite clear, therefore, that if the defendant was allowed to put up a second 90 day period after being prematurely surrendered under the first one, the fine and costs sentence would be delayed for a period greater than that anticipated by the statute. We therefore conclude that a defendant who is prematurely surrendered is not entitled to the advantages of a second fine and costs bond; however, such defendant is adequately protected by the provisions of §951.16, F. S., which provides as follows:

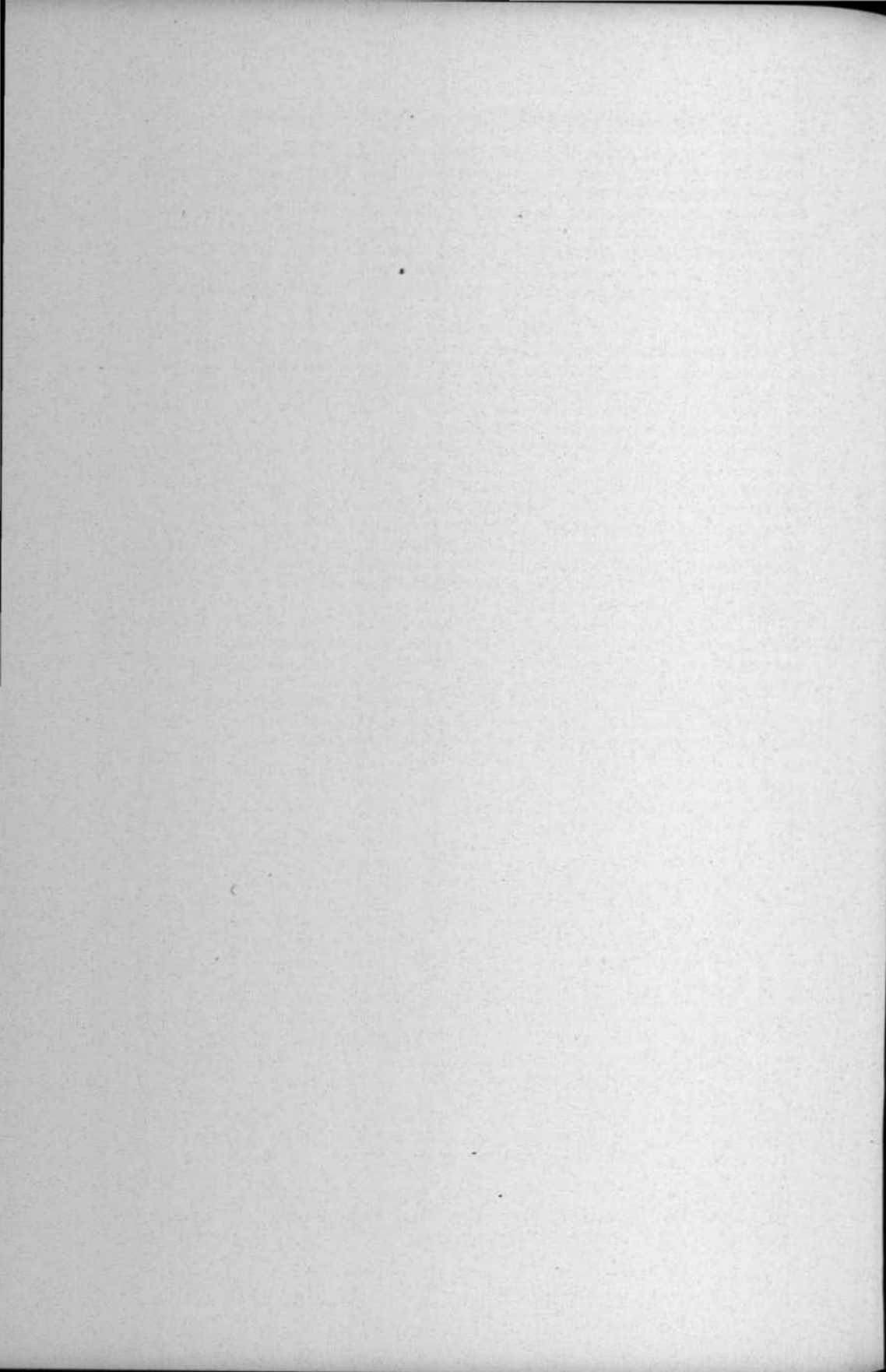
Every person who may be imprisoned in the county jail for failure to pay a fine and costs, or either, under sentence imposed, upon conviction for crime shall be entitled to receive, together with subsistence, a credit on such fine and costs, or either, as the case may be, in proportion to the time such person may be imprisoned.

Under the provisions of the above, the defendant may, at any time, obtain his release by paying that amount of his fine which is directly proportionate to the percentage of time remaining to be served on his alternative sentence of imprisonment. Two examples may serve to further explain the provisions of §951.16, *supra*:

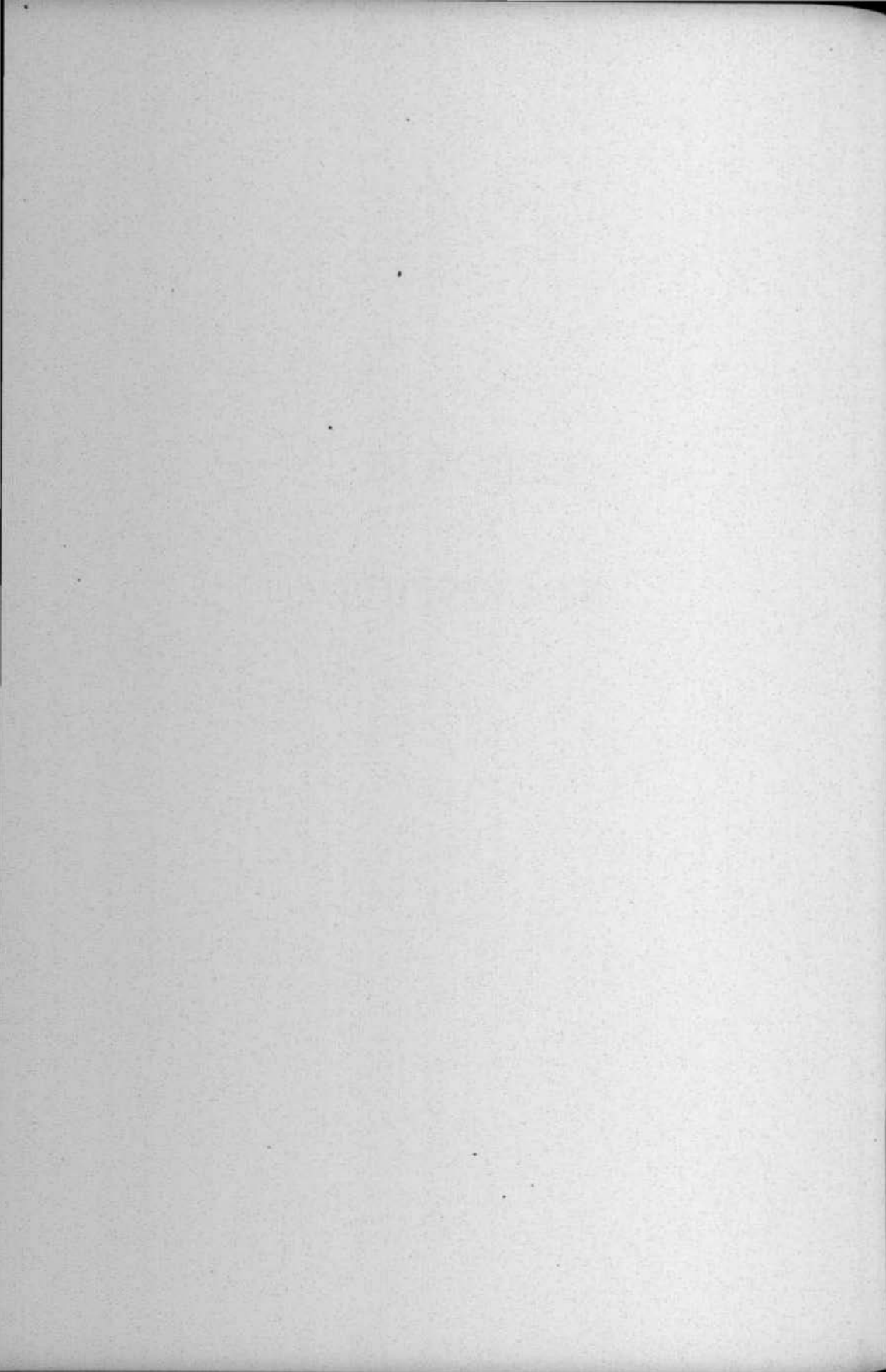
1. If a defendant is required to pay either \$100 for fine and costs, or serve 100 days in the county jail, and such defendant elects to serve 20 days of such sentence of 100 days, he would be entitled to his release upon paying \$80.

2. If a defendant has been required to pay the amount of \$60 for fine and costs, or to serve a 30 day prison sentence, and has served 2 days on such prison sentence, he would be entitled to release upon payment of \$56.

With regard to question 3, in instances of premature surrender of the defendant, the term of sentence would commence the day such defendant is returned to custody by the surety.



REPORTS
AND
STATISTICS



1963-1964 CONSTITUTIONAL AMENDMENTS

The 1963 Extraordinary and Regular Sessions of the Legislature adopted sixteen proposed amendments to the Florida Constitution. Three of those adopted at the Regular Session were voted on at a special election on November 5, 1963, and all three were ratified.

The proposed amendment to Article VII providing for reapportionment of the Legislature and the twelve other proposed amendments were submitted to the state electorate at the general election in November, 1964.

The electorate rejected the following proposed amendments: Amendment to Article VII, providing for reapportionment; amendment to Section 5 of Article XII, authorizing the expenditure of the principal of the State School Fund for Capital Outlay on behalf of Institutions of Higher Learning, Junior Colleges and Public Schools and an amendment to Section 16 of Article IX, relating to the distribution of gasoline and like taxes proposing to extend the period of time covered by said section. The remaining nine amendments were ratified and are set forth below together with the three ratified at the Special Election on November 3, 1964.

EXECUTIVE DEPARTMENT ARTICLE IV

SECTION 2. Election and term of governor.—The governor shall be elected by the qualified electors of the state. The first election for governor under this section shall be at the general election of 1964, for a term of two years and thereafter commencing with the general election of 1966, the governor shall be elected for a term of four years. The term of office shall begin the first Tuesday after the first Monday in January next after this election. The governor elected at the general election of 1964 shall be eligible for re-election to said office in the general election of 1966, but the governor elected at the general election of 1966 and thereafter shall not be eligible for re-election to said office the next succeeding term.

History.—Am. H.J.R. 428, 1963, adopted 1963.

SECTION 26. Commissioner of agriculture, duties, etc.—The commissioner of agriculture shall perform such duties in relation to agriculture as may be prescribed by law. He shall also have supervision of the state prison, and shall perform such other duties as may be prescribed by law.

History.—Am. H.J.R. 869, 1963, adopted 1964.

JUDICIAL DEPARTMENT ARTICLE V

SECTION 6. Circuit courts.—

(1) **JUDICIAL CIRCUITS.** The legislature may establish not more than twenty judicial circuits, each composed of a county or contiguous counties and of not less than fifty thousand inhabitants, according to the last census authorized by law, except that the county of Monroe shall constitute one of the circuits; provided, however, there shall be no reduction in the number of circuit judges residing in any county formerly a part of a judicial circuit, which circuit is hereafter created, divided, changed or revised.

History.—Am. H.J.R. 810, 1955, adopted 1956; (1) Am. H.J.R. 59, 1963, adopted 1964.

TAXATION AND FINANCE**ARTICLE IX**

SECTION 17. Bonds; land acquisition for outdoor recreation development.—The outdoor recreational development council, as created by the 1963 legislature, may issue revenue bonds, revenue certificates or other evidences of indebtedness to acquire lands, water areas and related resources and to construct, improve, enlarge and extend capital improvements and facilities thereon in furtherance of outdoor recreation, natural resources conservation and related facilities in this state; provided, however, the legislature with respect to such revenue bonds, revenue certificates or other evidences of indebtedness shall designate the revenue or tax sources to be deposited in or credited to the land acquisition trust fund for their repayment and may impose restrictions on their issuance, including the fixing of maximum interest rates and discounts.

The land acquisition trust fund, created by the 1963 legislature for these multiple public purposes, shall continue from the date of the adoption of this amendment for a period of fifty years.

In the event the outdoor recreational development council shall determine to issue bonds for financing acquisition of sites for multiple purposes the state board of administration shall act as fiscal agent, and the attorney general shall handle the validation proceedings.

All bonds issued under this amendment shall be sold at public sale after public advertisement upon such terms and conditions as the outdoor recreational development council shall provide and as otherwise provided by law and subject to the limitations herein imposed.

History.—S.J.R. 727, 1963, adopted 1963.

HOMESTEAD AND EXEMPTIONS**ARTICLE X**

SECTION 7. Exemption of homestead from taxation.—Every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon said person, shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of five thousand dollars on said home and contiguous real property, as defined in Article X, Section 1, of the constitution, for the year 1939 and thereafter, provided that in Sarasota County the first two thousand dollars of the assessed valuation of such property shall be taxable for school purposes only and the exemption shall apply to the next five thousand dollars for school purposes only of assessed valuation. Said title may be held by the entireties, jointly, or in common with others, and said exemption may be apportioned among such of the owners as shall reside thereon, as their respective interests shall appear, but no such exemption of more than five thousand dollars shall be allowed to any one person or on any one dwelling house, nor shall the amount of the exemption allowed any person exceed the proportionate assessed valuation based on the interest owned by such person. The legislature may prescribe appropriate and reasonable laws regulating the manner of establishing the right to said exemption.

History.—Added H.J.R. 20, 1933, adopted 1934; Am. S.J.R. 21, 1937, adopted 1938; Am. H.J.R. 1030, 1963, adopted 1964.

EDUCATION

ARTICLE XII

SECTION 2C. County superintendent of public instruction; appointment in certain counties.—

(1) The county superintendent of public instruction shall be appointed by the county board of public instruction in the counties of Escambia, Lake, Martin, Okeechobee, Palm Beach, Putnam and Seminole wherein the proposition is affirmed by a majority vote of the qualified electors of any such county making the office of county superintendent of public instruction appointive.

(2) The board of public instruction of the county must request an election, which may be a special election or may be on the ballot of any regular primary or general election to be designated by the board of public instruction, and upon such timely request the board of county commissioners of such county will call such special election or cause to be placed on the ballot at such other election the proposition whether subsection 1 shall be effective in such county.

(3) Any county adopting the provisions of subsection (1) hereof may after four years return to its former status and reject the provisions of this section by the same procedure outlined in subsection (2) hereof for adopting the provisions thereof in the beginning.

(4) In the event a referendum election results in a change in the method of selecting a county superintendent, the incumbent shall be permitted to serve the remainder of the term of office to which he was duly elected or appointed.

History.—Added H.J.R. 1045, 1963, adopted 1964.

SECTION 2D. County superintendent of public instruction; appointment in certain counties.—

(1) The county superintendent of public instruction shall be appointed by the county board of public instruction in Taylor county, providing the proposition is affirmed by a majority vote of the qualified electors of Taylor county making the office of county superintendent of public instruction appointive.

(2) To submit the proposition contained in subsection (1) to the electors a special election shall be called by the county commissioners of Taylor county upon the request of the county board of public instruction, which election shall be held within sixty days after the request and the result thereof shall determine whether subsection (1) shall be effective in said county.

(3) Should the county adopt the provisions of subsection (1) hereof it may, after four years return to its former status and reject the provisions of this section by the same procedure outlined in subsection (2) hereof for adopting the provisions thereof in the beginning.

(4) In the event a referendum election results in a change in the method of selecting a county superintendent, the incumbent shall be permitted to serve the remainder of the term of office to which he was duly elected or appointed.

History.—Added H.J.R. 2194, 1963, adopted 1964.

SECTION 18. School bonds for capital outlay, insurance.—

(a) Beginning January 1, 1965 and for thirty-five years thereafter, the first proceeds of the revenues derived from the licensing of motor vehicles to the extent necessary to comply with the provisions of this amendment, shall, as collected, be placed monthly in the county capital outlay and debt service school fund in the state treasury, and used only as provided in this amendment. Such revenue shall be distributed annually among the several counties in the ratio of the number of instruction units in each county in each year computed as provided herein. The amount of the first revenues derived from the licensing of motor vehicles to be so set aside in each year and distributed as provided herein shall be an amount equal in the aggregate to the product of four hundred dollars multiplied by the total number of instruction units in all the counties of Florida. The number of instruction units in each county in each year for the purposes of this amendment shall be the greater of (1) the number of instruction units in each county for the school fiscal year 1951-52 computed in the manner heretofore provided by general law, or (2) the number of instruction units in such county for the school fiscal year computed in the manner heretofore or hereafter provided by general law and approved by the state board of education (hereinafter called the state board), or (3) the number of instruction units in each county on behalf of which the state board of education has issued bonds or motor vehicle tax anticipation certificates under this amendment which will produce sufficient revenues under this amendment to equal one and one-third times the aggregate amount of principal of and interest on such bonds or motor vehicle tax anticipation certificates which will mature and become due in such year, computed in the manner heretofore or hereafter provided by general law and approved by the state board.

Such funds so distributed shall be administered by the state board as now created and constituted by section 3 of article XII of the Constitution of Florida. For the purposes of this amendment, said state board, as now constituted, shall continue as a body corporate during the life of this amendment and shall have all the powers provided in this amendment in addition to all other constitutional and statutory powers related to the purposes of this amendment heretofore or hereafter conferred upon said board.

(b) The state board shall, in addition to its other constitutional and statutory powers, have the management, control and supervision of the proceeds of the first part of the revenues derived from the licensing of motor vehicles provided for in subsection (a). The state board shall also have power, for the purpose of obtaining funds for the use of any county board of public instruction in acquiring, building, constructing, altering, improving, enlarging, furnishing, or equipping capital outlay projects for school purposes, to issue bonds or motor vehicle tax anticipation certificates, and also to issue such bonds or motor vehicle tax anticipation certificates to pay, fund or refund any bonds or motor vehicle tax anticipation certificates theretofore issued by said state board. All such bonds shall bear interest at not exceeding four and one-half per centum per annum and shall mature serially in annual installments commencing not more than three years from the date of issuance thereof and ending not later than thirty years from the date of issuance or January 1, 2000, A.D., whichever is earlier. All such motor vehicle tax anticipation certificates shall bear interest at

not exceeding four and one-half per centum per annum and shall mature prior to January 1, 2000, A.D. The state board shall have power to determine all other details of said bonds or motor vehicle tax anticipation certificates and to sell at public sale after public advertisement, or exchange said bonds or motor vehicle tax anticipation certificates, upon such terms and conditions as the state board shall provide.

The state board shall also have power to pledge for the payment of the principal of and interest on such bonds or motor vehicle tax anticipation certificates, including refunding bonds or refunding motor vehicle tax anticipation certificates, all or any part from the anticipated revenues to be derived from the licensing of motor vehicles provided for in this amendment and to enter into any covenants and other agreements with the holders of such bonds or motor vehicle tax anticipation certificates at the time of the issuance thereof concerning the security thereof and the rights of the holders thereof, all of which covenants and agreements shall constitute legally binding and irrevocable contracts with such holders and shall be fully enforceable by such holders in any court of competent jurisdiction.

No such bonds or motor vehicle tax anticipation certificates shall ever be issued by the state board until after the adoption of a resolution requesting the issuance thereof by the county board of public instruction of the county on behalf of which such obligations are to be issued. The state board of education shall limit the amount of such bonds or motor vehicle tax anticipation certificates which can be issued on behalf of any county to seventy-five per cent of the amount which it determines can be serviced by the revenue accruing to the county under the provisions of this amendment, and such determination shall be conclusive. All such bonds or motor vehicle tax anticipation certificates shall be issued in the name of the state board of education but shall be issued for and on behalf of the county board of public instruction requesting the issuance thereof, and no election or approval of qualified electors or freeholders shall be required for the issuance thereof.

History.—Added S.J.R. 106, 1951, adopted 1952; Am. S.J.R. 218, 1963, adopted 1964.

SECTION 19. Institutions of higher learning and junior college capital outlay trust fund; bonds.—

(a) That beginning January 1, 1964, and for fifty years thereafter, all of the proceeds of the revenues derived from the gross receipts taxes collected from every person, including municipalities, receiving payment for electricity for light, heat or power, for natural or manufactured gas for light, heat or power, for use of telephones and for the sending of telegrams and telegraph messages, as now provided and levied as of the time of adoption of this amendment in Chapter 203, Florida Statutes (hereinafter called "Gross Receipts Taxes"), shall, as collected be placed in a trust fund to be known as the "Institutions of Higher Learning and Junior Colleges Capital Outlay and Debt Service Trust Fund" in the State Treasury (hereinafter referred to as "Capital Outlay Fund"), and used only as provided in this Amendment.

Said fund shall be administered by the State Board of Education, as now created and constituted by Section 3 of Article XII of the Constitution of Florida (hereinafter referred to as "State Board"). For the purpose of this Amendment, said State Board, as

now constituted, shall continue as a body corporate during the life of this Amendment and shall have all the powers provided in this Amendment in addition to all other constitutional and statutory powers related to the purposes of this Amendment heretofore or hereafter conferred by law upon said State Board.

(b) The State Board shall have power, for the purpose of obtaining funds for acquiring, building, constructing, altering, improving, enlarging, furnishing or equipping capital outlay projects theretofore authorized by the legislature and any purposes appurtenant or incidental thereto, for Institutions of Higher Learning or Junior Colleges, as now defined or as may be hereafter defined by law, and for the purpose of constructing buildings and other permanent facilities for vocational technical schools as provided in chapter 230 Florida Statutes, to issue bonds or certificates, including refunding bonds or certificates to fund or refund any bonds or certificates theretofore issued. All such bonds or certificates shall bear interest at not exceeding four and one-half per centum per annum, and shall mature at such time or times as the State Board shall determine not exceeding, in any event, however, thirty years from the date of issuance thereof. The State Board shall have power to determine all other details of such bonds or certificates and to sell at public sale, after public advertisement, such bonds or certificates, provided, however, that no bonds or certificates shall ever be issued hereunder to finance, or the proceeds thereof expended for, any part of the cost of any capital outlay project unless the construction or acquisition of such capital outlay project has been theretofore authorized by the Legislature of Florida. None of said bonds or certificates shall be sold at less than ninety-eight per centum of the par value thereof, plus accrued interest, and said bonds or certificates shall be awarded at the public sale thereof to the bidder offering the lowest net interest cost for such bonds or certificates in the manner to be determined by the State Board.

The State Board shall also have power to pledge for the payment of the principal of and interest on such bonds or certificates and reserves therefor, including refunding bonds or certificates, all or any part of the revenue to be derived from the said Gross Receipts Taxes provided for in this Amendment, and to enter into any covenants and other agreements with the holders of such bonds or certificates concerning the security thereof and the rights of the holders thereof, all of which covenants and agreements shall constitute legally binding and irrevocable contracts with such holders and shall be fully enforceable by such holders in any court of competent jurisdiction.

No such bonds or certificates shall ever be issued by the State Board in an amount exceeding seventy-five per centum of the amount which it determines, based upon the average annual amount of the revenues derived from said Gross Receipts Taxes during the immediately preceding two fiscal years, or the amount of the revenues derived from said Gross Receipts Taxes during the immediately preceding fiscal year, as shown in a certificate filed by the State Comptroller with the State Board prior to the issuance of such bonds or certificates, whichever is the lesser, can be serviced by the revenues accruing thereafter under the provisions of this Amendment; nor shall the State Board, during the first year following the ratification of this amendment, issue bonds or certificates in excess of seven times the anticipated revenue from said Gross

Receipts Taxes during said year, nor during each succeeding year, more than four times the anticipated revenue from said Gross Receipts Taxes during such year. No election or approval of qualified electors or freeholder electors shall be required for the issuance of bonds or certificates hereunder.

After the initial issuance of any bonds or certificates pursuant to this Amendment, the State Board may thereafter issue additional bonds or certificates which will rank equally and on a parity, as to lien on and source of security for payment from said Gross Receipts Taxes, with any bonds or certificates theretofore issued pursuant to this Amendment, but such additional parity bonds or certificates shall not be issued unless the average annual amount of the revenues derived from said Gross Receipts Taxes during the immediately preceding two fiscal years, or the amount of the revenues derived from said Gross Receipts Taxes during the immediately preceding fiscal year, as shown in a certificate filed by the State Comptroller with the State Board prior to the issuance of such bonds or certificates, whichever is the lesser, shall have been equal to one and one-third times the aggregate amount of principal and interest which will become due in any succeeding fiscal year on all bonds or certificates theretofore issued pursuant to this Amendment and then outstanding, and the additional parity bonds or certificates then proposed to be issued. No bonds, certificates or other obligations whatsoever shall at any time be issued under the provisions of this Amendment, except such bonds or certificates initially issued hereunder, and such additional parity bonds or certificates as provided in this paragraph. Notwithstanding any other provision herein no such bonds or certificates shall be authorized or validated during any biennium in excess of fifty million dollars, except by two-thirds vote of the members elected to each house of the legislature; provided further that during the biennium 1963-1965 seventy-five million dollars may be authorized and validated pursuant hereto.

(c) Capital outlay projects theretofore authorized by the legislature for any Institution of Higher Learning or Junior College shall be eligible to participate in the funds accruing under this Amendment derived from the proceeds of bonds or certificates and said Gross Receipts Taxes under such regulations and in such manner as shall be determined by the State Board, and the State Board shall use or transmit to the State Board of Control or to the Board of Public Instruction of any County authorized by law to construct or acquire such capital outlay projects, the amount of the proceeds of such bonds or certificates or Gross Receipts Taxes to be applied to or used for such capital outlay projects. If for any reason any of the proceeds of any bonds or certificates issued for any capital outlay project shall not be expended for such capital outlay project, the State Board may use such unexpended proceeds for any other capital outlay project for Institutions of Higher Learning or Junior Colleges and vocational technical schools, as defined herein, as now defined or as may be hereafter defined by law, theretofore authorized by the State Legislature. The holders of bonds or certificates issued hereunder shall not have any responsibility whatsoever for the application or use of any of the proceeds derived from the sale of said bonds or certificates, and the rights and remedies of the holders of such bonds or certificates and their right to payment from said Gross Receipts Taxes in the manner

provided herein shall not be affected or impaired by the application or use of such proceeds.

The State Board shall use the moneys in said Capital Outlay Fund in each fiscal year only for the following purposes and in the following order of priority:

(1) For the payment of the principal of and interest on any bonds or certificates maturing in such fiscal year.

(2) For the deposit into any reserve funds provided for in the proceedings authorizing the issuance of said bonds or certificates, of any amounts required to be deposited in such reserve funds in such fiscal year.

(3) After all payments required in such fiscal year for the purposes provided for in (1) and (2) above, including any deficiencies for required payments in prior fiscal years, any moneys remaining in said Capital Outlay Fund at the end of such fiscal year may be used by the State Board for direct payment of the cost or any part of the cost of any capital outlay project theretofore authorized by the legislature or for the purchase of any bonds or certificates issued hereunder then outstanding upon such terms and conditions as the State Board shall deem proper, or for the prior redemption of outstanding bonds or certificates in accordance with the provisions of the proceedings which authorized the issuance of such bonds or certificates.

The State Board may invest the moneys in said Capital Outlay Fund or in any sinking fund or other funds created for any issue of bonds or certificates, in direct obligations of the United States of America or in the other securities referred to in Section 344.27, Florida Statutes.

(d) The State Board shall have the power to make and enforce all rules and regulations necessary to the full exercise of the powers herein granted and no legislation shall be required to render this Amendment of full force and operating effect on and after January 1, 1964. The Legislature, during the period this Amendment is in effect, shall not reduce the rate of said Gross Receipts Taxes now provided in said Chapter 203, Florida Statutes, or eliminate, exempt or remove any of the persons, firms or corporations, including municipal corporations, or any of the utilities, businesses or services now or hereafter subject to said Gross Receipts Taxes, from the levy and collection of said Gross Receipts Taxes as now provided in said Chapter 203, Florida Statutes, and shall not enact any law impairing or materially altering the rights of the holders of any bonds or certificates issued pursuant to this Amendment or impairing or altering any covenants or agreements of the State Board made hereunder, or having the effect of withdrawing the proceeds of said Gross Receipts Taxes from the operation of this Amendment.

The State Board of Administration shall be and is hereby constituted as the Fiscal Agent of the State Board to perform such duties and assume such responsibilities under this Amendment as shall be agreed upon between the State Board and such State Board of Administration. The State Board shall also have power to appoint such other persons and fix their compensation for the administration of the provisions of this Amendment as it shall deem necessary, and the expenses of the State Board in administering the provisions of this Amendment shall be paid out of the proceeds of bonds or certificates issued hereunder or from said Gross Receipts Taxes deposited in said Capital Outlay Fund.

(e) No capital outlay project or any part thereof shall be financed hereunder unless the bill authorizing such project shall specify it is financed hereunder and shall be approved by a vote of three-fifths of the elected members of each house.

History.—H.J.R. 264, 1963, adopted 1963.

MISCELLANEOUS PROVISIONS

ARTICLE XVI

SECTION 1A. Continuity of government.—The legislature, in order to insure continuity of state and local governmental operations in periods of emergency resulting from disasters caused by enemy attack, shall have the power and the immediate duty (1) to provide for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices, and (2) to adopt such other measures as may be necessary and proper for insuring the continuity of governmental operations. In the exercise of the powers hereby conferred the legislature shall in all respects conform to the requirements of this Constitution except to the extent that in the judgment of the legislature so to do would be impracticable or would admit of undue delay.

History.—Added S.J.R. 268, 1963, adopted 1964.

SECTION 4F. Civil trials in branch courthouses in Dade county.—Civil trials may be held as provided by law in branch courthouses in any municipality within Dade county. The clerk of any court, the sheriff, and any other court officer, within said county, shall maintain such offices within such municipality, and have available such official books and records therein, as may be necessary to accomplish the purposes of this amendment, provided that the principal offices of such clerks or other officers shall not be removed from the county seat.

History.—Added S.J.R. 1083, 1963, adopted 1964.

SECTION 7. Terms of offices created by legislature.—The legislature shall not create any office, the term of which shall be longer than four years, except membership on the board charged with responsibility for colleges and universities (not including junior colleges) which terms may be extended by the legislature to not more than nine years.

History.—Am. S.J.R. 267, 1963, adopted 1964.

AMENDMENTS

ARTICLE XVII

SECTION 4*. Additional method of revising or amending constitution.—As a method of revising the entire constitution of Florida, and as an additional method of revising or amending any portion or portions of it, either branch of the legislature, at any regular session, or at any special or extraordinary session called for the purpose, may propose by joint resolution a revision of the entire constitution or a revision or amendment of any portion or portions thereof and may direct and provide for an election thereon.

If the joint resolution is adopted by vote of three fifths of the members elected to each house, the yeas and nays shall be entered upon their respective journals, and the proposed revision or amendment shall be submitted to the electors of the state for ratification or rejection at the next general election held more than

seventy days after the adoption of the resolution unless, by vote of three fourths of the members elected to each house, the legislature shall provide for submission at a special election at an earlier date. The secretary of state shall cause notice of the proposed revision or amendment and of the date of the election thereon to be published twice in one newspaper in each county in which a newspaper is published, the first publication to be not more than ten or less than eight weeks before the election and the second publication to be at least one week after the first and not less than four weeks before the election. If the proposed revision or amendment receives the favorable vote of a majority of the electors voting thereon, it shall take effect at noon on the first Tuesday after the first Monday of the January following the election if voted upon in a general election, and on the sixtieth day after the election if voted upon in a special election, or in either case on any date designated therein.

History.—Added H.J.R. 368, 1963, adopted 1964.

*Case pending in supreme court to determine final vote count from Hillsborough county on this amendment.

CONSTITUTIONAL AND STATUTORY DUTIES OF ATTORNEY GENERAL

The attorney general in Florida derives his office from the people. He is elected by popular choice and acquires his powers and authority and is charged with the duties of his office from three primary sources: First, the common law; second, the Constitution of Florida; third, the statutory law.

Judicial decision, interpretation and construction enter the picture by way of defining, declaring and designating this authority and these duties within the common law, constitutional and statutory, grant and limitation.

COMMON LAW POWERS, DUTIES AND AUTHORITY

He is as much the representative of the State of Florida in the supreme court, as the King's Attorney General in his representative in the Court of King's Bench. It is his sole duty to appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal, or in equity, in which the state may be a party, or in anywise interested, in the supreme court of this state. At common law his office is in many respects judicial in character and he is clothed with considerable discretion. If the power exists, it is not a question of right in him to institute the necessary proceeding when in his opinion a condition exists which requires the exercise of the power, it is a matter of duty. At common law it is his duty to prosecute all actions necessary to protect state's property and revenue, to represent the state in all criminal cases before the appellate court; to revoke and annul grants made by the state improperly or when forfeited by the grantee; to determine the right of anyone who claims or usurps any office; to vacate the charter or annul the existence of a corporation for violations of its charter or for omitting to exercise its corporate powers; to enforce trusts; to prevent public nuisances; and in the absence of express legislative restrictions, to exercise all such power and authority as public interest may require. *State ex rel Landis, Attorney General, et al v. S. H. Kress & Co., 115 Fla. 189, 155 So. 823.*

CONSTITUTIONAL POWERS, DUTIES AND AUTHORITY

The state constitution provides the following relative to the Attorney General:

1. Member of pardon board (§12, Art. IV).
2. Member of board of commissioners of state institutions (§17, Art. IV).
3. Administrative officer to the governor; member of cabinet (§20, Art. IV).
4. Legal adviser to governor and each of the officers of the executive department (cabinet) (§22, Art. IV).
5. Reporter for supreme court (§22, Art. IV).
6. Submit biennial reports to the governor to be presented to the legislature (§27, Art. IV).
7. Prepare legislation each session pursuant to recommendations of conference of circuit judges (§6, Art. V).
8. Handle validation proceedings for bonds issued by outdoor recreational development council (§17, Art. IX).
9. Member of board of education (§3, Art. XII).

STATUTORY POWERS, DUTIES AND AUTHORITY

In addition to his common law and constitutional powers, duties and authority, the attorney general has the following general and regular statutory powers, duties and authority, to:

1. Appear in and attend to suits or prosecutions in any of the courts of the state or in any courts of any other state or of the United States in behalf of the state of Florida (§16.01).
2. Give his official opinion and legal advice in writing on any matter touching their official duties, upon the written requisition of the governor, secretary of state, treasurer, comptroller or superintendent of public instruction (§16.01, F. S., and §22, Art. IV, Fla. Const.).
3. Exercise all powers and perform all duties incident to such office and to make and keep in his office a record of all official acts and proceedings, such record to contain copies of his opinions (§16.01, F. S., and §27, Art. IV, Fla. Const.).
4. Make a written report on the effect and operation of the acts of the last previous legislative session, and the decisions of the court thereon, to the governor, five days before the first day of every session of the legislature (§16.05).
5. Report to each session of the legislature such legislation as he may deem advisable concerning defects in laws.
6. Exercise general superintendence and direction over the several state attorneys (§16.08).
7. Direct and be in charge of the statutory revision department, which also includes legislative bill drafting (§§16.43, 16.44, 16.46-16.48, 16.50, 16.51).
8. Prepare alphabetical indexes for the journals of the legislature and in this connection employ competent indexers who shall be attaches of the legislature and paid as other attaches are paid (§16.44).
9. Participate with other states in preserving the constitutional integrity of the state (§16.52).
10. Approve the bond of the comptroller (§17.01).
11. Act as legal adviser to the state auditing department (§21.091).
12. Act as emergency successor to governor's office (§22.04).

13. Report to legislature on conference of circuit judges (\$26.55).
14. Represent juvenile court in appeals proceedings (\$39.14 (5)).
15. Conduct condemnation proceedings on behalf of the board of commissioners of state institutions and on behalf of the adjutant general's office for military purposes (\$73.22).
16. Conduct quo warranto proceedings (\$80.03).
17. Represent the state in proceedings under the declaratory judgment law where the constitutionality of statutes is involved (\$87.10).
18. Devise a suitable seal for the supervisors of registration (\$98.341).
19. Examine audited reports of state executive committee and file same as public record (\$103.121).
20. Report and turn over to state treasurer all perquisites fixed by law accruing from administration (\$111.02).
21. Handle appeals from judgment of forfeiture of unclaimed property (\$116.32).
22. Approve title to real estate in which the state is interested (\$135.16).
23. Represent the state in tax lien foreclosure proceedings by municipalities involving Murphy act lands (\$196.21).
24. Assist in the collection and enforcement of retail store license taxes (\$204.13).
25. Assist in enforcing law in sales of businesses (\$212.10 (2)).
26. Introduce proceedings to collect defaulted investments and otherwise protect state funds invested (\$215.46).
27. Take necessary action on appeals by board of public instruction regarding pupil assignment law (\$230.232(3)(c)).
28. Prepare contracts for purchase of uniform school books (\$233.16).
29. Approve school district bonds (\$236.48).
30. Prosecute violations of school budget law (\$237.23).
31. Act as legal adviser to board of trustees of the teachers' retirement system (\$238.03(9)).
32. Institute proceedings in the name of the state for the purpose of recovering moneys due the state from any medical scholarship recipient (\$239.61).
33. Represent board of control in eminent domain proceedings (\$240.14).
34. Conduct procedure for and act as counsel for board of commissioners of state institutions in condemnation of property as provided in §242.55(2) (\$242.58).
35. Act as legal adviser and representative of the board of trustees of the Florida state fire college (\$242.61).
36. Approve bonds given by institutions receiving bodies to anatomical board (\$245.14).
37. Conduct condemnation proceedings on behalf of the armory board (\$250.40).
38. Act as ex officio member and legal adviser of the state civil defense counsel (\$252.05).
39. Pass upon and approve regulations of district drainage board (\$298.53).
40. Act as legal adviser for the state road department. (Said

department, however, has a special attorney authorized by statute.) (§§334.171, 334.18).

41. Act as attorney for the public utilities commission (this work is negligible because of the fact that the public utilities commission has authority to employ its own special counsel) (§§350.29, 350.30, 350.31, 350.62, 350.66).

42. Assist public utilities commission in making investigations relating to the regulation of private wire service (§§365.06, 365.07).

43. Attend to all legal business arising in connection with the laws governing the salt water fishing industry and state board of conservation (§370.021(6)).

44. Represent the state in all appeals from judgment of forfeiture to the supreme court (§372.316).

45. Enforce the vital statistics law (§382.37).

46. Represent hospital licensing agency (§395.16).

47. Represent the state in proceedings to suspend or revoke licenses of labor union business agents (§447.10).

48. Assist in the enforcement of the basic science law (§456.22).

49. Assist in the enforcement of laws regulating the practice of optometry (§463.19).

50. Institute proceedings in the name of the state for the purpose of recovering moneys due the state from any dental scholarship recipient (§466.45).

51. Represent the state board of architects in judicial proceedings to which the board may be a party. However, the board is authorized by statute to secure other legal advice or service (§467.14).

52. Approve the form for bonds of nonresident outdoor advertisers (§479.06).

53. Act as legal adviser to the state board of dispensing opticians (§484.08).

54. Act as legal adviser and represent watchmakers commission in all courts and in all legal matters affecting commission (§489.10).

55. Act as legal adviser to board of registration for foresters (§492.19).

56. Assist in the enforcement of the laws regulating the sale of milk, cream and milk products (§502.26).

57. Assist in the enforcement of laws regulating small loan businesses (§516.23).

58. Pass upon permits of associations doing business under a declaration of trust (§§517.03, 609.05).

59. Assist in enforcement of law regulating sale of liquid fuels (§526.10).

60. Investigate and rectify commercial discriminations (§§540.02-540.05).

61. Investigate contracts obstructing competition in violation of fair trade law (§541.01).

62. Enforce the antitrust laws of the state (§542.03).

63. Bring proceedings to forfeit charters of corporations which violate the laws or fail to comply with mandatory requirements of same (§§542.03, 542.04, 542.09).

64. Prosecute combinations against Florida meats (§544.02).

65. Bring proceedings against combinations in restraint of motor vehicle financing (§545.08).

66. Act as attorney for the state racing commission. (Said commission, however, has statutory authority to employ its special counsel) (§550.01).

67. Represent state in all appeals from judgments of forfeiture (§562.404).

68. Act as counsel for the department of agriculture (§570.10).

69. Act as legal adviser to the soil conservation board. (Said board, however, has statutory authority to employ its special counsel.) (§582.09).

70. Bring proceedings against fair associations for annulment of their charters when laws relating to same are violated (§§615.11, 616.09).

71. Bring proceedings, under certain conditions, for annulment of franchises of social clubs (§617.09).

72. Bring proceedings, under certain conditions, to annul franchises of corporations not for profit (§617.09).

73. Institute and prosecute to final judgment such legal or equitable proceedings as may be advisable to revoke permit, prevent its improper use or prevent foreign corporation from exercising corporate powers within state (§§617.022, 617.11).

74. Bring proceedings to test the validity of the incorporation of cooperative marketing associations and nonprofit cooperative associations (§§618.23, 619.09).

75. Bring proceedings to dissolve professional service corporation because of legal disqualification of officer, shareholder, agent or employee (§621.10).

76. Represent the insurance commissioner in connection with insurance matters (§632.541).

77. Assist in fixing values of securities deposited with the state treasurer by trust companies under the trust law (§660.08).

78. Bring proceedings to recover escheated property (§731.33).

79. Bring proceedings to forfeit prize money in lotteries (§849.12).

80. Represent state in appeals from judgments of forfeiture of gambling devices to the supreme court (§849.42).

81. Enforce laws regarding subversive activities (§876.27).

82. Conduct extradition hearings for the governor (§941.04).

83. Act as attorney for the parole commission (§947.11).

84. Act as legal adviser to department of corrections (§944.52).

85. Furnish legal services to division of mental health (§965.01).

86. Furnish legal services to board of commissioners of state institutions in their protection of financial interests of the state with respect to claims for care and maintenance of patients of state institutions (§965.08).

87. Bring suits to collect expenses for mentally ill or insane persons (§965.08).

MEMBERSHIP IN BOARDS, COMMISSIONS AND COUNCILS

The attorney general is a member of the following state boards, commissions and councils:

1. State board of pardons (§12, Art. IV, Fla. Const.).

2. Board of commissioners of state institutions (\$17, Art. IV, Fla. Const.).
3. Governor's cabinet (\$20, Art. IV, Fla. Const.).
4. State board of education (\$3, Art. XII, Fla. Const., \$229.15).
5. Interstate cooperation commission (\$13.05).
6. Sheriff's bureau (\$30.36).
7. Board of appeals of county officers' budgets (\$30.49).
8. Judicial council (\$43.15).
9. State canvassing board (\$102.111).
10. State merit system personnel board (\$110.02).
11. Public records screening board (\$119.04).
12. Railroad assessment board (\$195.001).
13. Revenue commission (\$213.02).
14. State budget commission (\$216.01).
15. State board for vocational education (\$229.08(9)).
16. State textbook purchasing board (\$233.13).
17. State board of trustees of teachers' retirement system (\$238.03).
18. State civil defense council (\$252.05).
19. Trustees of internal improvement trust fund (\$253.02).
20. State purchasing commission (\$287.031).
21. State board of drainage commissioners (\$298.69).
22. Department of public safety executive board (\$321.01).
23. State board of conservation (\$370.02(1)).
24. Boating council (\$371.032).
25. Outdoor recreational development (\$375.021).
26. State housing board (\$424.04).
27. Florida securities commission (\$517.03).
28. Board of fixing values of investment securities of trust companies (\$660.08).

STATUTORY REVISION DEPARTMENT

The 1943 legislature created a permanent statutory revision, legislative, drafting and reference department, which is designated and known as the statutory revision department, under the direct supervision and control of the attorney general (§§16.43 et seq., F. S.). The powers, duties and functions of the said statutory revision department are set out in full in the foregoing cited statutes.

In compliance with the foregoing statutes, the statutory revision department was set up and developed, as a department, in the office of the attorney general and under his direct supervision and control. The work of the said statutory revision department is now carried on under the following plan and system.

Continuing plan of operation.—The statutory revision department operates, as directed under the statutes (see §§16.19-16.24, 16.27, 16.43, 16.44, 16.46-16.48, 16.50, 16.51, F. S.), to the fullest extent and according to the intent and purpose of said statutes, its work being carried forward in a continuous manner and in the following objective classification:

- (1) Continuing a systematic study of general statutes and laws for the purpose of reducing bulk, removing inconsistencies, eliminating redundancies and surplusages, correcting mistakes in grammar, punctuation, language, etc., combining and consolidating duplicate laws and otherwise performing the revisory function

contemplated in the law and providing for said revision by reviser's bills to be submitted to each session of the legislature.

(2) Carrying on the arrangement and identification of the general statutes and laws of this state as adopted in Florida Statutes, by adding, in the proper place, all new matter belonging therein; this material is compiled, revised and published biennially and adopted by each session of the legislature as the official Florida Statutes.

(3) Indexing each of the journals of the two branches of the legislature.

(4) Preparing and having printed from time to time pamphlets, special indexes and other materials relating to statutes and laws; securing copyrights and republishing when necessary.

(5) Carrying on a continuous reworking of the general index to the Florida Statutes in order that said index may be improved with each biennial publication.

(6) Indexing the general laws of each legislative session that are to be incorporated in the Florida Statutes. This material is indexed in the light of the existing general index so that the new material will fit into the existing pattern of said general index.

(7) Making a complete biennial revision of the general statutes and laws of this state to conform with the numbering system, style, contents and other characteristics of the Florida Statutes.

(8) Maintaining a bill drafting department for the benefit of the members of the legislature and the state officials, boards and agencies.

(9) Maintaining a legislative reference library in conformance with legislative authorization.

(10) Preparing, compiling and having printed such handbooks, and other publications of the attorney general as may be required by law or that in the opinion of the attorney general is deemed advisable.

(11) Assisting other state departments, bureaus and agencies in compiling laws affecting their activities and operation, and lending such assistance as may be required in having such compilations printed in proper form.

(12) Maintaining contacts with similar departments in other states, and with lawbook publishing companies and editors who show a tendency to cooperate and exhibit an interest toward the mutual betterment and advancement of work in this field.

Preservation of type used.—All type used in printing publications of the statutory revision department is required by law to be preserved, and is stored and protected by adequate insurance in conformity with such law.

Selection and supervision of personnel.—Personnel is selected and maintained according to the best talent available, and the work of the department is assigned and distributed to the personnel in such manner as to secure the best results, giving consideration to the particular talents of each person. Generally, however, responsibility is divided as follows:

(1) General supervision and control is under the attorney general, who, under authority of §16.43, F. S., selects a director. The director has the direct supervision and control of the department, and with the advice of the attorney general selects and employs the operating personnel and fixes their compensation.

(2) Principal study of the statutes, revisions and preparation

of reviser's bills is under the supervision of the director.

(3) Indexing and continuous study and revision of index material is by a qualified indexer who is under the administrative supervision of the director.

(4) Related work is kept up to date under the supervision of the director.

(5) Proofreading and checking is carefully and meticulously done by qualified persons.

(6) Stenographic and clerical work is performed by accurate and careful stenographers and clerks.

(7) Bill drafting and research between and during sessions of the legislature is done by such members of the department and the attorney general's office as may be qualified for such work, under the direction of the attorney general originally and upon recommendation and advice of the director.

The reviser's bills, as provided by statute, are prepared by the director and the department under his direction. The principal objectives of the reviser's bills are to correct, amend, consolidate, revise, repeal or otherwise immaterially alter or change any general statute or law, or parts thereof, of a general nature and application which may appear to be subject to revision but without changing substance, or altering operation and effect. They do not deal with:

(1) Statutes relating to or concerning one or more counties or municipalities, or parts thereof, except in certain cases where the subject matter relates to the creation or jurisdiction of state, county or municipal courts.

(2) Statutes relating to, concerning, or that would be operative in only a portion of the state, except in cases where the subject matter relates to the creation of jurisdiction of state or county courts.

(3) Statutes relating to or concerning only a certain municipal corporation.

(4) Statutes relating to or concerning one or more designated individuals or corporations.

(5) Statutes incorporating a designated individual corporation or making a grant thereto.

(6) Road designation laws.

The omission of any statute coming within the classifications aforesaid is properly accounted for in the tables or indexes.

In the compilation of material and the drafting of reviser's bills, the following rules and procedures are adhered to:

(1) A continuing and systematic study of the statutes is carried on.

(2) A careful search is made for:

(a) Inappropriateness of run-in lines to sections.

(b) Misspelled words and poor punctuation.

(c) Statutes limited as to time of operation and which have expired.

(d) Sections, or parts of sections, that conflict with, or the operation of which is inconsistent with, the logical operation of other sections.

(e) Laws that have become obsolete.

(f) Sections that are so poorly written that the meaning is not clear or that may be subject to more than one interpretation.

(g) Sections containing lengthy and superfluous matter that

may be rewritten for the sake of brevity.

(h) Sections that are poorly or incorrectly phrased in their reference to other parts of the statutes, or otherwise.

(i) Sections that, because of amendments and additions to the statutes, should be renumbered and placed in different sequence.

(j) Sections, or parts of sections, that have been constructively repealed or made inoperative by other laws.

(k) Conflicting powers and duties of officials.

(l) Repetitious statutes.

The department carries continuing history notes on each section of the statutes; maintains a running file containing a list of errors, suggestions, etc., that are submitted by members of the Florida Bar; and maintains a system of keeping comprehensive notes and data for the final preparation of the reviser's bills. In the preparation of reviser's bills, sections containing new material to be added or for the purpose of replacing existing sections are written with due regard to brevity, using as plain and modern language as possible and simple rather than complex words and phrases, with due regard to correct punctuation, avoiding verbosity and repetitions.

Each reviser's bill is accompanied by complete explanatory memos.

Printing.—Departmental printing is advertised and bids received for it according to the requirements of law. In addition, invitations to bid are mailed with copies of specifications, to all qualified printers within the state. Specifications are made up as simply as possible, with due regard for the insurance of a first-class product and for the protection of the state. Specifications are made up with a view toward economy, without sacrificing quality. General specifications and requirements are compiled and used so far as possible in the contracts for printing. Wide variance in style and form from that presently used is avoided.

**COMPILED STATEMENT OF CASES HANDLED,
OPINIONS AND MISCELLANEOUS LETTERS
WRITTEN IN THE ATTORNEY
GENERAL'S OFFICE**

(From Jan. 1, 1963 through Dec. 31, 1964)

CRIMINAL CASES

January 1, 1963—Cases pending	323
1963—New cases—Tallahassee—339	
Lakeland —233	
Miami —171	
1963—Habeas Corpus — 93	836
1964—New cases—Tallahassee—361	
Lakeland —344	
Miami —280	
1964—Habeas Corpus — 53	1,038
TOTAL	2,197
Closed cases—1963 —206	
Closed cases—1964 —880	
Closed Habeas Corpus cases —115 (1963-1964)	1,201
January 1, 1965—Cases pending	996

CIVIL CASES

January 1, 1963—Cases pending	583
1963—New cases—Tallahassee—270	
1964—New cases—Tallahassee—296	
Miami —200	766
(1963-1964)	
TOTAL	1,349
Closed cases—1963 —182	
Closed cases—1964 —482	664
January 1, 1965—Cases pending	685
1963—Opinions	160
1964—Opinions	184
1963—Subjects	311
1964—Subjects	287

1963—Miscellaneous letters 15,552

1964—Miscellaneous letters 16,311

(These figures include personal
letters by Kynes and Ervin)

1963—Invitations 377

1964—Invitations 411

1963—Opinions requested 573

1964—Opinions requested 518

Mailing List (Opinions)

1963—Opinions 29,120

1964—Opinions 34,390

Mailing List (Digest)

1963—Digest 20,800

1964—Digest 28,000

Extraditions

1963—Approved 560

1963—Rejected 32

1964—Approved 540

1964—Rejected 41

Statutory Revision
(Miscellaneous Letters)

1963 16,500

1964 11,600

TOTAL 28,100

RESUMÉ OF ARREST CASES

1960-1964

Total Gambling Arrests (Miscellaneous)	180
Total Bookmaking Arrests	115
Total Lottery Arrests	155
Total Wire Service Arrests	22
Total Dog Doping Arrests	5
Total Special Investigations	383
Total Miscellaneous Investigations	173
Total Private Wire Service Applications	99

INDEXES
and
CITATORS

OMITTED OPINIONS BY NUMBER AND SUBJECT MATTER

1963-1964*

	<i>Opinion</i>
BROWARD COUNTY; court of record; clerk's fees for record keeping	063-48
CLERKS; Broward county court of record; fees allowed	063-48
COUNCIL FOR THE BLIND; Welch property, clear title to; exceptions	064-72
COUNTY BUDGETS; amendments to existing budget; adoption of supplemental budgets, for certain county purposes	064-73
COUNTY COMMISSIONERS; deputy sheriff killed in line of duty; payment of death benefits authorized	064-155
CRIMINAL CASES; insolvent defendant, representation on appeal	064-102
CRIMINAL COURT OF RECORD; insolvent defendant, representation on appeal	064-102
DADE COUNTY; police officers' and firemen's retirement pension fund, establishment of; metropolitan Dade county, authorized	063-70
DEATH; deputy sheriff killed in line of duty; payment of death benefits authorized	064-155
FLORIDA DEVELOPMENT COMMISSION; Manatee county road revenue bonds; payments in accordance with requirements of contract	064-57
FLORIDA STATE EMPLOYEES ASSOCIATION; survivors' benefit fund; not eligible for exemption from Ch. 632, F. S.; qualification as insurance company necessary	064-161
LEE COUNTY; mosquito control district budget, amendment; higher tax levy, etc.	064-109
MANATEE COUNTY; toll bridges, road revenue bond to finance; payments in accordance with requirements of contract	064-57
MUNICIPALITIES; police officers' and firemen's retirement pension fund establishment of; metropolitan Dade county	063-70
PUBLIC DEFENDERS; defendant, representation on appeal; duty	064-102
ST. AUGUSTINE AIRPORT AUTHORITY; bonds and obligations; jurisdiction and powers of authority	064-166
STATE ROAD DEPARTMENT; Manatee county road revenue bonds; payments in accordance with requirements of contract	064-57
STATE UNIVERSITIES; university of Florida, classroom building, construction appropriation; procedure	064-4
SUMTER COUNTY RECREATION AND WATER CONSERVATION AND CONTROL AUTHORITY; watershed loan, application for; tax levy; referendum election	063-4

*A copy of any opinion omitted from this report is on file in this office.

GENERAL INDEX

—A—

	<i>Opinion Page</i>
ACTIONS	
Cases transferred from law to chancery or vice versa; collection of fees, etc.; procedure	064-165 491
Foreign corporations; small claims court; posting of cost bond	064-179 515
Public officers appearing as witnesses before grand juries or prosecuting officers; compensation	064-69 349
Small claims court; commencement of actions; plaintiff or his agent, construction to reference..	064-64 343
ADMINISTRATIVE PROCEDURE ACT; state agencies, dismissal of employees under its own internal rules; application of law	064-167 493
ADOPTION; clerks of circuit court; adoption of minors, recording of final decree in proceedings for; duties	064-89 383
ADVERTISEMENT	
Food and drug articles; false or misleading advertisements of prices on labels or containers; use of certain phrase; whether violative of §817.42 F. S.	064-146 464
Hearing aid dealers; hearing and speech therapy practice; unauthorized	064-115 415
Newspaper, entry as second class matter; qualified for legal advertising	064-150 474
AGRICULTURAL FAIRS; admissions to; sales tax situs	063-123 182
AGRICULTURAL LANDS	
Tax assessment on lower valuation in prior years; refunds	064-7 254
Zoning, assessment, valuation, etc.; authority of certain county officials	064-90 385
AIR POLLUTION CONTROL COMMISSION; rules and regulations, enforcement; procedure for handling violations	064-52 323
AIR SPACE; condominium building constructed in air space above surface of ground; separate tax situs	064-70 352
ALCOHOLIC BEVERAGES AND LIQUORS	
Beer, unattended coin-operated vending machines; sales to minors through, unlawful	063-23 31
Minors as members of social clubs, sale of beverages to; legality	063-16 23
AMELIA ISLAND MOSQUITO CONTROL DISTRICT; county budgets; budget making authority, duties re	064-129 434
AMERICAN LEGION; coin-operated weighing machines operated by American Legion; occupational license tax exemption	064-145 462

	<i>Opinion Page</i>	
ANTIQUES; ad valorem tax situs; standard of valuation	063-87	134
APPEALS		
Issuance of writ; requirements and approval of bonds and sureties	063-109	165
Petitioner, bond requirements, motion for relief in trial court; or bond pending appeal	064-172	503
Public defenders; payment of filing fees on appeals	064-158	483
APPRENTICESHIP, DEPARTMENT OF See: INDUSTRIAL COMMISSION, FLORIDA		
APPROPRIATIONS; teachers' competence awards, funds for; not limited by 1963 appropriations act	064-1	245
ARCHITECTS; registration, laws regulating; building permit, prerequisites as to issuance of; authority of county commissioners	064-84	376
ARMORED CAR SERVICES; watchman, guards and patrolmen, employment; not within purview and operation of Ch. 493, F. S.; license requirement	063-145	220
ARRESTS; lottery promotion, person suspected of; authority of police officer to arrest without warrant	064-154	478
ASSISTANT STATE ATTORNEY See: STATE ATTORNEYS		
ATTACHMENT; issuance of writ; requirements and approval of bonds and sureties	063-109	165
AUDITING DEPARTMENT, STATE; audits of accounts of municipalities, deposit in escrow, estimated cost; allowance permitted	064-162	488
—B—		
BAIL BONDS		
Criminal court of record; termination of bond under certain conditions; clerk without authority under §903.26, F. S.	063-150	227
Petitioner, bond requirements, motion for relief in trial court; or bond pending appeal	064-172	503
BANKRUPTCY; trustees in; refunds of penalties in connection with delinquent taxes; payment authorized	063-60	93
BANKS AND TRUST COMPANIES		
Closing on Monday following a holiday on previous Saturday; prohibited	064-79	367
County depositories; "pro rata" distribution, interpretation	063-84	130
Retail installment sales; financing of purchase installment contracts; legality	063-33	49
School funds		
Depository; officer of bank, unpaid educational committee member; qualification of bank as depository	063-118	178

	<i>Opinion Page</i>	
BANKS AND TRUST COMPANIES (cont.)		
School funds (cont.)		
Deposits, pro rata share of; qualification as county depositories	064-25	282
BARBERS		
Schools, qualification of teachers	064-14	268
Shop; change in either ownership or name; new registration certificate required	064-95	391
BARBERS' SANITARY COMMISSION		
Grandfather clause; effect of provision on barbers licensed under 1931 law without examination	064-130	437
Hearings conducted for purpose of adopting rules, regulations or orders relating to certain economic practices; legality	063-37	56
BEER See: ALCOHOLIC BEVERAGES AND LIQUORS		
BELLEAIR BEACH, TOWN OF; elections, corrupt practice acts, applicability to	064-3	249
BIDS; county commissioners; rejection of bids not in conformity with advertised requirements	063-55	84
BILLIARDS; minors as members of social clubs, playing by; legality	063-16	23
BOARD OF COMMISSIONERS OF STATE INSTITUTIONS; legislative printing; contracts covering certain printing, divided; permissible	064-170	495
BOARD OF PHARMACY See: PHARMACY, BOARD OF		
BOARDS OF COUNTY COMMISSIONERS See: COUNTY COMMISSIONERS		
BOATS		
Chartered or rented on certain basis; sales tax status	064-9	256
Motorboats See: MOTORBOATS		
Tax assessments against; cancellation	063-128	191
BONDS		
Defendant; fine and cost bond, surrender by surety maker prior maturity; effect on term of imprisonment	064-184	521
Deputy sheriff, hold over to new administration, renewal of bond; requirement	064-180	516
Foreign corporations; small claims court; posting of cost bond	064-179	515
Forfeiture of appearance bond, remission of; time limitation	063-112	170
Owned by resident of Florida encumbering real property in another state; tax situs	064-53	325
Surety See: SURETY BONDS		
Writs of attachment, replevin, distress for rent, garnishment and appeals; approval of bonds and sureties prior to issuance by clerk	063-109	165

	<i>Opinion</i>	<i>Page</i>
BOYS' CLUBS; property leased and used by; tax exempt status	063-146	222
BUDGET COMMISSION, STATE		
Budget director; performance of additional duties in a different capacity; additional compensation, authorized	063-155	234
Taxation, uniform and equal throughout state; powers in connection re	064-171	497
BUSES; county school buses, installation of additional signal lights; authority of school board	063-149	226
—C—		
CAMPBELLTON-GRACEVILLE HOSPITAL DISTRICT; officers and employees, eligibility for participation in state and county retirement system ..	064-127	431
CARBON COPY INSTRUMENTS; original signed copy, recording; clerk, circuit court; authority	063-108	164
CEMETERY; trust funds for maintenance and care; intangible personal property tax; status	063-3	4
CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT		
District taxes in several counties; assessors and collectors, measure of compensation	064-93	388
Mangrove islands and growth as land; district tax situs	064-61	334
CHANCERY; cases transferred from law to chancery or vice versa; collection of fees, etc.; procedure	064-165	491
CHARITABLE ORGANIZATIONS; insurance agents' commissions, contribution to nonprofit organization; prohibitive	064-68	349
CHARLOTTE COUNTY; gas and oil leases, authority of county to enter into with private companies	064-149	472
CHECKS; sales tax, bad check issued for payment; procedure for collection	063-74	115
CHIROPRACTORS		
Death certificates, signing by, authorized by law ..	064-175	510
Workmen's compensation law, furnishing medical services under; rights of employer or his carrier ..	064-11	263
CHURCH; homes maintained for retired Methodist preachers; nonprofit corporation; tax situs	063-5	6
CIGARETTES; unattended coin-operated vending machines; sales to minors through; unlawful	063-23	31
CIRCUIT COURT; criminal procedure; rule 1; effect upon term of imprisonment	063-62	95
CIRCUIT JUDGES		
Headquarters established at location other than county seat; travel and per diem allowance	064-21	277
Prior services by; resuming office again; retirement benefits under Ch. 38, F. S.	064-19	273

CIRCUIT JUDGES (cont.)

Retired under Ch. 123, F. S., prior to establishment of divisions A-C; social security coverage, transfer for; eligibility	063-159	241
--	---------	-----

CIVIL ACTIONS See: ACTIONS

CIVIL AIR PATROL; leave of absence from county employment with pay while on emergency duty; prohibited	064-119	422
--	---------	-----

CIVIL RIGHTS; person adjudged guilty and placed on probation loses civil rights privileges; restoration required	064-163	489
--	---------	-----

CLERKS

Bail bonds, termination of, under certain conditions; clerk without authority under §903.26, F. S.	063-150	227
Precinct polling places, serving at; compensation ..	063-119	179

CLERKS, CIRCUIT COURTS

Adoption of minors, recording of final decree in proceedings for; duties	064-89	383
Carbon copy of instrument, originally signed; recording	063-108	164
Compensation; authorized from other portions by special acts, included as income of office	064-159	484
Condominium declaration, recording; fee	063-152	230
Fees; recording satisfactions of mortgages; marginal notes, indexing	063-106	162
Maps and plats, recording; refusal by clerk when fail to meet requirements; legality	064-31	288
Notary public as employee of office; performing services of notary public; notarial fees	064-81	369
Records of certain obligations not personally binding; intangible personal property tax situs	064-12	264
Tax deed sales, payment of bid at; requirement	063-65	101
Unclaimed funds held for certain period; construction of certain sections; duty	064-47	315
Writs of attachment, replevin, distress for rent, garnishment and appeals; approval of bonds and sureties prior to issuance by clerk	063-109	165
COIN-OPERATED VENDING MACHINES; beer and cigarettes; sale to minors where machine is unattended; unlawful	063-23	31

COMPTROLLER

Employee, compensation accruing to and at time of death; disposition	063-122	181
Taxation, uniform and equal throughout state; powers in connection re	064-171	497

CONDOMINIUM PROPERTY

Apartments, records and recording; title papers, deeds, etc.; requirements	063-27	39
Building constructed in air space above surface of ground; separate tax situs	064-70	352
Declaration of condominium; clerk's fee	063-152	230

	<i>Opinion Page</i>	
CONDOMINIUM PROPERTY (cont.)		
Parcels		
Homestead exemption rights; tax status	064-20	275
Sale of; rights and interests therein; subject to court ruling	064-62	336
CONFERENCE; definition as used in §112.06, F. S. ..	063-95	147
CONFESSIONS; defendants, permission to inspect ..	064-16	269
CONFLICT OF INTEREST		
Bank officer, unpaid educational committee mem- bers; school fund depository, qualification of bank as	063-118	178
Governing body; effect of member not voting on issue; legality	063-83	129
CONSERVATION, STATE BOARD OF		
Boats or vessels propelled or powered by motors more than 10 horsepower; license tax	063-78	122
	063-80	126
Division of beaches and shores; permits for instal- lation of piers, docks, wharves, etc.; jurisdiction of trustees of internal improvement fund	063-67	103
CONSTABLES		
Bond approval fee prior conviction of defendant; collection prohibited	063-30	44
Civil cases, fees allowed for service of summons or writs; remittance; applicability of Ch. 63-41	063-96	149
Impersonation of officer; search warrant executed in district other than own; liability	063-58	90
CONTACT LENSES; fitting or adapting to eyes and face of patient other than by licensed physician or optometrist; legality	063-144	216
CONTRACTORS		
Home improvement contractors, negotiation of mortgage loans by; license requirements under mortgage brokerage act	064-38	298
Mechanics' lien against property owned by school board; release and payment; procedure	064-45	312
CONTRACTORS, PUBLIC; prevailing wage law, meaning of "any aggrieved party" used in	064-10	260
CONTRACTS		
Annual contracts for road surfacing on square yard basis; county commissioners, authority	064-120	424
Highlands county; bids on certain job; contract award, condition	063-158	240
Insurance premium financing arrangements and contract agreements; tax situs	063-38	57
Medical doctors, contracts in restraint of practice of medicine, prohibited	064-121	425
Real property, contracts or agreement for sale of; tax situs	064-60	332
CONVENTION; definition as used in §112.06, F. S. ..	063-95	147

CONVEYANCES See: DEEDS AND
CONVEYANCES

COOPERATIVE APARTMENT; share of stock or interest in, transfer of; tax situs	064-41	302
CORPORATE STOCK; value of, for tax purposes when not listed or sold on markets; elements to determine	064-154	478

CORPORATIONS

Foreign corporations; small claims court; posting of cost bond	064-179	515
Homes maintained for retired Methodist preachers; nonprofit corporation; tax situs	063-5	6
Professional service corporations See: PROFESSIONAL SERVICE CORPORATIONS		
CORRUPT PRACTICE ACT; municipal election, applicability of law to	064-3	249

COSMETOLOGY LAW

Examination of applicants; additional fee for second examination; legality	064-108	407
Junior cosmetologist, twelve month practice period not counted toward five-year practicing certificate	064-131	438
Student's transfer to another school, fees for; authority of board	064-108	407
COSTS; retrial of persons accused of crime under criminal procedure rule No. 1; costs and expenses, payments	063-115	174

COUNCIL FOR THE BLIND

Case files; whether or not confidential or accessible to clients involved	064-132	439
Employee recalled for active military duty; military leave of absence with pay; eligibility	064-125	430

COUNTIES

Alleged incompetent detained in municipal hospital under order of court; county expense, payment	064-88	381
Elections See: ELECTIONS		
Federal highway reimbursement funds; disposition of, by state road department	063-56	85
Governmental agencies; tax returns; construction Ch. 63-342; requirements	063-138	206
Property owned by state, county or city; lease contracts prior to 6/16/61; tax situs	063-73	113

COUNTY BOARDS OF PUBLIC INSTRUCTION

County school buses, installation of additional signal lights; authority of school board	063-149	226
Equipment, lease agreements on, of nonconsumer nature for use in school system; insurance; term of lease, etc.	063-53	81

COUNTY BOARDS OF PUBLIC INSTRUCTION (cont.)

Investment of surplus funds in federal and state savings and loan associations; legality	063-22	31
Junior colleges, unbudgeted internal funds of, administering by board; authority	064-40	302
Mechanics' lien against property owned by school board; release and payment; procedure	064-45	312
Member holding office without commission prior to filing bond; compensation	064-99	396
Okeechobee county; revenue certificates, issuance; by school board; maximum limitations	063-52	81
Sale of land and school property, contract for; authority of board	063-59	91
School activities carried on in school buildings or athletic fields, control and authority	064-142	457
School funds		
Depository of; officer of bank, unpaid educational committee member; qualification of bank as depository	063-118	178
Investment and deposits of; security; insurance coverage, etc.	064-111	409
School property; disposal		
Improvements, razing or removing; relocating various and sundry utility easements, etc.; payment of costs; authority	064-86	379
Professional services, payment in regard to sale of; authority	064-86	379
Superintendent of public instruction		
Appointment beginning January 5, 1965; duty of new school board	064-182	519
Educational requirements and qualifications; authority of board	063-28	41
Teachers		
Examinations; authenticated scores, furnishing of by examining agency; authority of agency	064-56	328
Seventy years or older; employment; authority of board	064-26	284

COUNTY BUDGETS

Physicians to examine certain employees in defense of claims or reduce workmen's compensation insurance; budget item authorized	064-134	444
Tax levy, budget making authority re special districts and officers	064-129	434

COUNTY COMMISSIONERS

Annual contract for road surfacing on square yard basis; authority	064-120	424
Architects and engineers, building permits, prerequisites as to issuance; authority	064-84	376
Bids, rejection of, not in conformity with advertised call for	063-55	84
County administrator, authority; construction of Ch. 63-575 as to authority of county commissioners and administrator	064-24	280

Opinion Page

COUNTY COMMISSIONERS (cont.)

County budget, budget for physician to examine certain employees in defense of claims or reduce insurance, authorized	064-134	441
County funds, deposit of, in federal and state savings and loan associations; prohibited	064-183	520
County officers and employees, per diem and travel allowances	063-117	177
County owned buildings and contents, purchase of insurance to cover; authority	064-168	494
Courthouses, assignment of office spaces; duties	064-63	341
Director of health unit, authority to fix salary; approval of state budget commission and merit system; Dade county	063-142	210
Equalization board, duties and powers; general re tax equalization	064-140	452
Indian River hospital district; budget of county funds to pay losses from indigent patients; legality	064-96	392
Investment of surplus funds in federal and state savings and loan associations; legality	063-22	31
Juvenile welfare board budget; authority of commissioners to delete certain items	064-101	399
Prosecuting attorney; employment by county; limitation of compensation; reports, filing requirements	063-113	171
Tax equalization board; reconvening of after adjournment to correct certain errors; permitted....	064-151	475

COUNTY DEPOSITORIES

Bonds issued by Georgia authorities; not acceptable for deposit by county depositories	063-39	59
"Pro rata" distribution; interpretation	063-84	130
School fund deposits, pro rata share of; qualification as county depositories	064-25	282

COUNTY DEVELOPMENT AUTHORITIES; officers and employees; state and country retirement system; eligibility

064-33 291

COUNTY FUNDS; deposits of, in federal and state savings and loan associations; prohibited

064-183 520

COUNTY HEALTH UNIT See: HEALTH

COUNTY HOSPITALS; tangible personal property, responsibility for safekeeping

063-20 28

COUNTY JUDGE-COUNTY JUDGE'S COURT

Bond approval fee prior conviction of defendant; collection prohibited	063-30	44
Compensation of county judge as judge of county court; §§34.20 and 34.21, F. S., construed	064-94	390
Forfeiture of appearance bond, remission of; time limitation	063-112	170
Judge's salary and expenses; operation on budget system; Ch. 63-365, pursuant to provisions of	063-121	181
Travel expense, Volusia county judge, between county seat and auxiliary court; payment	064-118	421

COUNTY OFFICERS AND EMPLOYEES

Civil air patrol; leave of absence from county employment with pay while on emergency duty; prohibited	064-119	422
County budget, budget for physician to examine certain employees in defense of claims or reduce insurance, authorized	064-134	444
Deputy sheriff, hold over to new administration, renewal of bond; requirement	064-180	516
Per diem and travel allowances; authority of county commissioners	063-117	177

COUNTY SUPERINTENDENTS OF PUBLIC INSTRUCTION See: SUPERINTENDENT OF PUBLIC INSTRUCTION, COUNTY

COURT REPORTERS

Criminal proceedings, compensation for reporting; payment	064-66	346
Public defender, services of reporter requested by; insolvent defendants; payment of charges	064-144	460
COURTHOUSES; office spaces, assignments; duty of boards of county commissioners	064-63	341

COURTS

See also: Specific courts		
Condominium property; sale of parcels; rights and interest therein; legality of titles	064-62	336
Foreign corporations; small claims court; posting of cost bond	064-179	515

CRIMES AND OFFENSES

Minors; police record of child accused of felony; release of information; prohibited	064-43	307
Stolen property; purchase, concealment, etc.; restitution made; effect of reducing crime	064-17	272

CRIMINAL CASES

Bond approval fee prior conviction of defendant; collection prohibited	063-30	44
Court reporter's compensation for reporting criminal proceedings; payment	064-66	346
Public officers appearing as witnesses before grand juries or prosecuting officers; compensation	064-69	349

CRIMINAL PROCEDURE

Bail bonds, termination of, under certain conditions; clerk without authority under §903.26, F. S.	063-150	227
Court reporter's compensation for reporting criminal proceedings; payment	064-66	346
Defendants		
Fine and costs bond		
Arrested under parole violation; sureties on bond, obligations	063-19	28
Surrender by surety maker prior maturity; effect on term of imprisonment	064-184	521

CRIMINAL PROCEDURE (cont.)

Defendants (cont.)

Permission to inspect confessions or written or recorded statements	064-16	269
Enforcement officers; physical removal of persons from restaurants; authority	063-71	109
Felons; registration with sheriff's bureau, requirements	063-66	102
Interpreters in criminal cases, compensation	064-59	330
Juvenile judge; jurisdiction waived, imprisonment of juveniles when	063-99	152
Notary public; conviction of felony in federal court; effect of right to act in state	063-91	140
Person adjudged guilty and placed on probation loses civil rights privileges; restoration required	064-163	489
Petit larceny conviction; person's civil rights not restored; right to vote	064-87	380
Petitioner, bond requirements, motion for relief in trial court; or bond pending appeal	064-172	503
Public defenders, criminal cases See: PUBLIC DEFENDERS		
Retrial of persons accused of crime under criminal procedure rule 1; costs and expenses, payments ..	063-115	174
Rule 1; effect upon term of imprisonment	063-62	95
Service of witness subpoenas, sheriff's fee	063-101	156
Statements and confessions, furnishing to accused during preliminary hearing	064-107	406

—D—

DADE COUNTY

Director of health unit, authority to fix salary; approval of state budget commission and merit system	063-142	210
Revaluation of taxable property; authority of legislature to enact legislation postponing court decision; prohibited	064-116	416
South Miami; assessment and collection of taxes on county tax rolls; permitted	063-137	204
DEATH; hospital release of information concerning deaths of patients prior to certain conditions	064-78	366

DEEDS AND CONVEYANCES

Conveyances; interlocking corporate interests and subsidiaries; tax situs	063-18	26
Tax deed sales, payment of bid at; requirement	063-65	101

DEFENDANTS

Court reporter, services requested; insolvent defendant; payment of charges	064-144	460
Fine and costs bond		
Made by; arrested under parole violation; surety on bond, obligations	063-19	28
Surrender by surety maker prior maturity; effect on term of imprisonment	064-184	521

DEFENDANTS (cont.)

Insolvent; representation in court proceedings

See: PUBLIC DEFENDERS

Statements and confessions, furnishing to accused during preliminary hearing

064-107 406

DEPARTMENT OF AGRICULTURE; out-of-state produced milk, sale of in Florida; authority of agriculture department

064-133 441

DEPARTMENT OF APPRENTICESHIP See: INDUSTRIAL COMMISSION, FLORIDA

DEPARTMENT OF EDUCATION; teacher examinations; authenticated scores, furnishing of by examining agency; authority of agency

064-56 328

DETECTIVE AGENCIES; occupational license taxes, requirement

063-103 157

DEVELOPER OF SUBDIVISION; system of water supply to 25 or more persons; state board of health approval

064-80 368

DISABLED PERSONS; parking meters; disabled persons, exemption from payment of parking fees

064-153 477

DISTRICT COURTS OF APPEAL; judge, prior credit under judges' retirement for service as state employee

063-139 208

DIVISION OF BEACHES AND SHORES; permits for installation of piers, docks, wharves, etc., jurisdiction of trustees of internal improvement fund

063-67 103

DIVISION OF CORRECTIONS; prisoners, released; clothing, gratuity or transportation; duties

063-57 87

DOCUMENTARY STAMP TAX

Conveyances; interlocking corporate interests and subsidiaries; tax situs

063-18 26

Insurance premium financing arrangements and contract agreements; tax situs

063-38 57

Military bases, documents executed on; tax situs

063-136 203

Mortgage obligation, additional advances; tax situs

064-49 317

Professional service corporations, stock issued by; tax situs

064-30 287

Promissory notes

Modification of extension of; tax situs

063-141 209

Use in connection with original obligation, additional advances; tax situs

064-49 317

Real property

Options, purchase and sale contracts, binder agreements relating to; tax situs

063-116 175

Sale by U. S. to Hillsborough county port authority; tax situs

063-131 195

Stock

Dividends and stock splits, original issue; excise tax situs

063-7 9

Transactions; tax situs

063-107 163

Wholesale warehouse mortgage agreements; principal obligation, etc.; tax situs

064-82 371

DRIVER'S LICENSE

Nonresident; employed in another state; short period employment in state for employer; driver's license, requirement	064-44	310
Suspension due to incompetency; fee for re-examination when competency reinstated	064-137	449
DUAL OFFICES; state budget director; performance of additional duties in a different capacity; additional compensation, authorized	063-155	234
DUVAL COUNTY; Jacksonville port authority; employees of; status of retirement; Duval county employees pension fund	064-156	479
DWELLING UNITS; overlapped or encroached on each other; separate tax assessment situs	063-15	21

—E—

EASEMENTS; spoil deposit easements granted; tax exempt status of lands	064-181	517
EAST DUVAL COUNTY MOSQUITO CONTROL DISTRICT; district commissioners; commissioned by governor; bond required as prerequisite to functioning	064-174	508

EDUCATION

Teachers See: SCHOOLS

EDUCATIONAL INSTITUTIONS; construction of school plant; tax exemption when rights to tax exemption attaches	063-92	140
EGG COMMISSION, FLORIDA; official meetings; proxy voting upon matters before commission; legality	064-114	414

ELECTIONS

Ballot, placement of name on against wishes of person concerned; unlawful	064-32	289
Election officials; jurors and witnesses serving at precincts; compensation	063-119	179
Electors		
Illiterate electors; casting ballots, assistance at polls; not authorized	064-126	431
Residence and domicile; participation in election when home divided by boundary line	063-31	45
Illiterate electors; casting ballots, assistance at polls; not authorized	064-126	431
Municipal elections, corrupt practice act, applicability to	064-3	249
National convention, delegates to; eligibility to change preference after deadline for qualifying ..	064-37	297
Petit larceny conviction; person's civil rights not restored; right to vote	064-87	380
Public school employees, political participation by; prohibited	063-69	107
Registration		
Members of armed forces stationed outside state; residence and domicile; eligibility	064-39	299

ELECTIONS (cont.)	
Registration (cont.)	
Persons residing on military reservations; eligible for voting	064-147 466
School superintendents	
Election or appointment, procedure for election to determine	063-25 33
Re-submitting appointive issue to electorate; interval of time	063-129 191
ENFORCEMENT OFFICERS; restaurants, physical removal of persons from; authority	
	063-71 109
ENGINEERS; registration, laws regulating; building permit, prerequisites as to issuance of; authority of county commissioners	
	064-84 376
EQUALIZATION TAX BOARD See: TAXATION	
ESTATE TAXES	
Contract for sale and conveyance of realty; non-resident entered into prior death; measure of tax	063-32 47
Nonresident estates; resident personal representatives; tangible personal property tax; tax situs	063-1 1
Nonresident of state; property located in state and foreign country; calculation of taxes due Florida	063-140 209
ESTATES OF DECEDENTS	
Contract for sale and conveyance of realty; nonresident entered into prior death; measure of tax	063-32 47
Intangible personal property taxes and tax liens; estate closed prior certain date; status of unpaid taxes	063-24 32
—F—	
FAIRS; agricultural; admissions, tax situs	063-123 182
FEDERAL SAVINGS AND LOAN ASSOCIATIONS	
County commissioners and school boards, surplus funds; investments in; legality	063-22 31
County funds, deposit in; prohibited	064-183 520
Municipal fund; investment in federal savings and loan associations; authorized	063-41 63
FELONS	
Person adjudged guilty and placed on probation loses civil rights privileges; restoration required	064-163 489
Registration with sheriffs' bureau; requirements	063-66 102
FINE AND FORFEITURE FUND; public defenders; payment of filing fees on appeals	064-158 483
FIREMEN'S AND POLICEMEN'S PENSION TRUST FUND See: MUNICIPALITIES	
FLORIDA BUILDING AND LOAN ASSOCIATIONS; county funds, deposit; prohibited	064-183 520
FLORIDA COUNCIL FOR THE BLIND See: COUNCIL FOR THE BLIND	

Opinion Page

FLORIDA DEVELOPMENT COMMISSION

Bonds or certificates, issuance by, as legal investment and security for public deposits, rating	063-104	159
Tourist promotional campaign; prize award; whether violative of lottery law	064-18	272

**FLORIDA INDUSTRIAL COMMISSION See:
INDUSTRIAL COMMISSION, FLORIDA**

FLORIDA INLAND NAVIGATION DISTRICT; spoil deposit easements granted; tax exempt status of lands	064-181	517
---	---------	-----

FLORIDA MEDIATION AND CONCILIATION SERVICE See: MEDIATION AND CONCILIATION SERVICE

FLORIDA MILK COMMISSION; funds derived from taxes, licenses or fees; use of fund in administration of law	064-97	394
---	--------	-----

FLORIDA PEACH ORCHARDS, INC.; performance guarantee as part of land sales contract; within the definition of security	064-177	511
---	---------	-----

FLORIDA STATE BOARD OF MEDICAL EXAMINERS See: MEDICAL EXAMINERS, STATE BOARD OF

FOOD AND DRUGS; false or misleading advertisements of prices on labels or containers; use of certain phrase; whether violative of §817.42, F. S.	064-146	464
---	---------	-----

FOOD SERVICE ESTABLISHMENTS; municipal ordinance, violation of; revocation or suspension of license prohibitive	064-76	359
---	--------	-----

FORFEITURE; appearance bond, remission of; time limitation	063-112	170
--	---------	-----

—G—

GAMBLING

Match covers distributed by advertising agency which contain winning number; prize awards under certain conditions; whether violative	064-42	306
---	--------	-----

Radio station promotional contest; whether violative of law	063-49	76
---	--------	----

Real estate; promotional site; contest; prize awards; whether violative	064-46	313
---	--------	-----

Sweepstakes; nationwide advertising promotion program; violative of lottery law	063-153	231
---	---------	-----

Tourist promotional campaign sponsored by Florida development commission; whether violative of law	064-18	272
--	--------	-----

GARNISHMENT; issuance of writ; requirements and approval of bonds and sureties	063-109	165
--	---------	-----

GOVERNING BODIES; conflict of interest; effect of member not voting on issue; legality	063-83	129
--	--------	-----

GOVERNOR; extended regular session, effect on bills on governor's desk at end of 60-day period of time to consider	063-46	73
--	--------	----

—H—

HEALTH

Dade county health unit; director, fixing of salary; authority of county commissioners; approval	063-142	210
State board of health; subdivision developer; system of water supply to 25 or more persons; approval	064-80	368
HEARING AID DEALERS; hearing and speech therapy by dealers constitute unauthorized practice of medicine	064-115	415
HIGHLANDS COUNTY; bids on certain job; contract award, condition	063-158	240
HIGHWAY; motor vehicles, towing by means of tow-bar on interstate highways, legal requirements	064-152	476
HOME-A-RAMA; operators and tenants; sales of goods from stalls or compartments; occupational tax situs	063-68	105
HOMES FOR THE AGED; services for the aged, furnishing of certain; advertisements; license requirements	063-126	187

HOMESTEAD EXEMPTIONS

Any one dwelling house, construction of phrase	064-128	432
Application for exemption filed with municipal officer not required; exception	064-169	494
Condominium parcels; homestead exemption rights; tax status	064-20	275
Construction of 1964 constitutional amendment; assessments and limitations; affect of amendment on Art. IX, §9, of Florida constitution	064-178	514
Husband and wife, claims by		
Different counties, in; tax situs	063-9	12
Separate exemptions; prohibited	064-5	251
Joint tenancies; occupancy by one joint tenant; rights	063-29	43
Mentally incompetent owner, committed to state hospital; rental of homestead; tax situs	063-8	11
Minors		
Temporary aliens; property owners; permanent resident with parents; tax situs	063-10	13
Unmarried, living with parents, residing on property owned by him; tax exemption	063-47	75
Row housing; party or common wall, common or contiguous roof; separate exemption; tax situs ..	063-151	228

HOSPITALS

Alleged incompetent detained in municipal hospital under order of court; county expense, payment ..	064-88	381
County hospitals See: COUNTY HOSPITALS		
Deaths of patients prior to certain conditions; release of information concerning	064-78	366
HOTELS AND RESTAURANTS; municipal ordinance, violation of; revocation or suspension of license prohibitive	064-76	359

Opinion Page

HOUSE OF REPRESENTATIVES

Eligibility of member for newly created senate seats	063-12	17
House general expense fund; expenses incident to increase membership; payments	063-13	19
Journals of the senate and house, contents and entries required to be reflected by	063-26	36
HOUSE TRAILERS; tangible personal property, taxes, when and how enforceable	063-40	62
HOUSING AUTHORITIES; engaged as dealer in liquefied petroleum and gas installation; subject to Ch. 527, F. S., regulations	064-117	419

HUSBAND AND WIFE

Homestead exemptions, claims for		
Living in different counties; tax situs	063-9	12
Separate exemptions, prohibited	064-5	251

—I—

IMPEACHMENT TRIAL See: LEGISLATURE

INCOMPETENTS

Alleged incompetent detained in municipal hospital under order of court; county expense, payment ..	064-88	381
Temporary commitment in state hospital; civil rights automatically restored	064-51	322

INDIAN RIVER COUNTY; hospital district; budget of county funds to pay losses from indigent cases; legality	064-96	392
--	--------	-----

INDUSTRIAL COMMISSION, FLORIDA

Apprenticeship department		
Expenditure of funds for training other than apprenticeship training; authority	063-14	20
Program, administration insofar as compliance with prevailing wage law; without authority ..	064-10	260

INDUSTRIAL DEVELOPMENT CORPORATIONS; tax exemption rights of corporations organized under Ch. 289, F. S.; status	064-6	253
--	-------	-----

INFANTS See: MINORS

INSURANCE

Charitable nonprofit organization, agents' commissions contributed to; prohibitive	064-68	349
County-owned buildings and contents, purchase of insurance to cover; authority of county commissioners	064-168	494
Insurance premium financing arrangements and contract agreements; tax situs	063-38	57
Pre-need burial contracts; sale of vaults or burial supplies; compliance with Ch. 639, F. S.	064-148	471

INSURANCE (cont.)

Reciprocal insurers plan without attorney-in-fact or subscriber's reciprocal agreement of indemnity; requirements	064-160	487
Stockholders, not qualified as agents; dividend sharing; eligibility	064-48	317

INTERNAL IMPROVEMENT FUND

Trustees See: TRUSTEES, INTERNAL
IMPROVEMENT FUND

INTERPRETERS; criminal cases; compensation	064-59	330
--	--------	-----

—J—

JACKSONVILLE-DUVAL AREA PLANNING

BOARD; officers and employees, status; retirement system, eligibility	063-61	94
JACKSONVILLE PORT AUTHORITY; employees of; status of retirement; Duval county employees pension fund	064-156	479
JAI ALAI FRONTONS; operating days; maximum allotment allowed by racing commission	064-157	481
JOURNAL, SENATE AND HOUSE; contents and entries required to be reflected by	063-26	36
JUDICIAL CIRCUITS; public defenders; office expenses, payment	063-82	127

JUNIOR COLLEGES

New York world's fair, use of school funds for participation in educational section; legality	064-55	328
Unbudgeted internal funds, administering by school board; authority	064-40	302
JURISDICTION; juvenile judge; jurisdiction waived, imprisonment of juveniles when	063-99	152
JUROR; precinct polling places, serving at; compensation	063-119	179
JUSTICE OF PEACE; bond approval fee prior conviction of defendant; collection prohibited	063-30	44
JUVENILE JUDGE; jurisdiction waived, imprisonment of juveniles when	063-99	152

JUVENILE WELFARE BOARD

Allocation of public tax funds to certain private agencies; prohibitive	064-101	399
Budget; authority of county commissioners to delete certain items	064-101	399

—K—

KINDERGARTENS; educational institutions, operating as; standard requirements; courses of study, etc.; tax exemptions	063-34	50
--	--------	----

—L—

LAKE COUNTY; annual contracts for road surfacing on square yard basis; county commissioners, authority	064-120	424
LAKELAND, CITY OF; municipal electric plant, authority to underwrite part of purchase price of electrical appliances sold to private individuals for further sale of electricity; legality	063-63	99
LANDS; encumbered by spoil disposal easements conveyed by landowners; tax situs	064-105	404, 517
LARCENY; petit larceny conviction; person's civil rights not restored; right to vote	064-87	380
LAW ENFORCEMENT OFFICERS; witness, appearing as; per diem and travel expense allowances	063-114	172
LEASES; gas and oil leases, authority of county to enter into with private companies	064-149	472
LEAVE OF ABSENCE		
Civil air patrol, county employment with pay while on emergency duty; prohibited	064-119	422
Florida council for the blind; employee recalled for active military duty; leave of absence with pay; eligibility	064-125	430
LEE COUNTY; mosquito control district; purchase of airplane; leasing same; authority	063-133	198
LEGISLATURE		
Dade county, revaluation of taxable property; authority of legislature to enact legislation postponing court decision; prohibited	064-116	416
Extended regular session, effect on bills on governor's desk at end of 60-day period of time to consider	063-46	73
House of representatives		
Eligibility of member for newly created senate seat	063-12	17
House general expense fund; expenses incident to increased membership; payments	063-13	19
Impeachment trial; senator's subsistence pay allowance	063-88	135
Journals of the senate and house		
Contents and entries required to be reflected by	063-26	36
	064-173	505
Records, information, etc.; necessary requirements	063-26	36
	064-173	505
Legislative printing, contracts divided for certain publications, authorized	064-170	495
LEON COUNTY; blood bank trust; nonprofit, tax exempt status	063-17	25
LICENSES AND LICENSE TAXES		
Armored car services; watchmen, guards and patrolmen, employment; not within purview and operation of Ch. 493, F. S.; license requirement	063-145	220

LICENSES AND LICENSE TAXES (cont.)

Coin-operated weighing machines operated by American legion; occupational license tax exemption ..	064-145	462
Detective agencies; occupational license taxes, requirement	063-103	157
Home-A-Rama operators and tenants; sales of goods from stalls or compartment; tax situs	063-68	105
Hotels and restaurants; municipal ordinance, violation of; revocation or suspension of license prohibitive	064-76	359
Massage machines; operation by unlicensed operators; occupational license tax requirements	063-54	82
Motor vehicle sales act to factors or commission merchants; license tax requirements	063-35	52
Motorized carts, license or tax exemption situs	064-8	255
Occupational tax, refunds where no tax due	064-54	326
Real estate brokers and salesmen		
Municipal occupational license tax liability	064-23	279
Not engaged in practice of profession, occupational license requirement	064-123	428
Resident of state or agent taking orders for interstate delivery; occupational license tax status	063-21	29
Wholesalers transacting business from vehicles to municipalities elsewhere; occupational license situs	064-112	413

LIENS

Mechanics' lien law See: MECHANICS' LIEN LAW

Out-of-state lands, lien held by resident of Florida; tax situs	064-53	325
Public defenders; state of claim; procedure for filing lien; expense, payment, etc.	063-90	137

LIQUEFIED PETROLEUM GAS

Classification as manufactured or natural gas; sale to certain consumers; tax situs	063-100	154
Construction of §203.01, F. S.; defines meaning of term	064-50	319
Housing authorities engaged as dealer in liquefied petroleum and gas installation; subject to Ch. 527, F. S., regulations	064-117	419

LITTLE THEATRES; admissions and membership subscriptions; sales tax exemption

063-132 196

LOANS; under §631, et seq., Title 15, U. S. Code; tax situs

063-51 79

LOTTERY

Arrest of person without warrant suspected of promoting a lottery; authority of police officers	064-154	478
Match covers distributed by advertising agency which contain winning number; prize awards under certain conditions; whether violative	064-42	306
Radio station promotional contest; whether violative of law	063-49	76

	<i>Opinion Page</i>	
LOTTERY (cont.)		
Real estate; promotional site; contest; prize awards; whether violative	064-46	313
Sweepstakes; nation-wide advertising promotion program; violative of lottery law	063-153	231
Tourist promotional campaign sponsored by Florida development commission; whether violative of law	064-18	272

—M—

MAPS AND PLATS; recording by clerks; refusal when fail to meet requirements; legality		
	064-31	288
MASSAGE MACHINES; operation by unlicensed operators; occupational license tax requirements		
	063-54	82
MATCH COVERS; distributed by advertising agency which contain winning number; prize awards under certain conditions; whether violative		
	064-42	306
MECHANICS' LIEN LAW		
School board, property owned by, release and payment of lien against; procedure	064-45	312
State owned property; notice to owner by subcontractors supplying materials or labor; requirement	064-122	427
MEDIATION AND CONCILIATION SERVICE; labor disputes; powers under public utility arbitration law		
	063-86	133
MEDICAL EXAMINERS, STATE BOARD OF; administrative hearing, designation of certain members; members sitting with board to render final orders; legality		
	063-93	143
MEDICINE, PRACTICE OF		
Hearing aid dealers; hearing and speech therapy practice; unauthorized	064-115	415
Medical doctors, contracts in restraint of practice of medicine prohibited	064-121	425
MENTALLY INCOMPETENT PERSONS; suspension due to incompetency; fee for re-examination when competency reinstated		
	064-137	449
MILITARY BASES		
Documents executed on; documentary stamp tax status	063-136	203
Mortgage encumbering real property; obligations, execution on base; tax situs	064-58	329
MILITARY FORCES; registration of person residing on military reservations; eligible for voting		
	064-147	466
MILITARY LEAVE; Florida council for the blind; employee recalled for active military duty; leave of absence with pay; eligibility		
	064-125	430
MILK AND MILK PRODUCTS; out-of-state produced milk, sale of in Florida; authority of agriculture department		
	064-133	441

MINORS

Adoption of minors, recording of final decree in proceedings for; duties of clerk of circuit court ..	064-89	383
Beer and cigarettes, sale of through unattended coin-operated vending machines; unlawful	063-23	31
Notary public; disabilities of nonage removed; eligibility for appointment	063-111	168
Police record of child accused of felony; release of information; prohibited	064-43	307
Property owners, temporary aliens; homestead exemption claims; tax situs	063-10	13
Social clubs, members; sale of alcoholic beverages to; billiards and pool playing by, etc.; legality	063-16	23
Unmarried minor living with parents, residing on property owned by him; claim for homestead tax exemption	063-47	75

MORTGAGE BROKERS

Home improvement contractors, negotiation of mortgage loans by; license requirements	064-38	298
Persons not licensed as; prohibited from receiving compensation in connection with mortgage loan transactions	064-71	355
Real estate broker, agreements with; referrals of mortgage loan transaction; for compensation; prohibited	064-71	355

MORTGAGES

Additional advances secured by; documentary stamp tax situs	064-49	317
Note secured by mortgage or lien on lands in another state held by resident of Florida; tax situs	064-53	325
Satisfaction of; recording; clerk's fee	063-106	162

MOSQUITO CONTROL DISTRICTS

Airplane purchase; leasing same; Lee county	063-133	198
District commissioners; commissioned by governor; bond required as prerequisite to functioning	064-174	508

MOTEL; definition, interpretation of	064-15	269
--	--------	-----

MOTOR COURT; motel, interpretation of definition of	064-15	269
---	--------	-----

MOTOR VEHICLES

Driver's license See: DRIVER'S LICENSE

License plates obtained by worthless check; demand upon applicant for surrender	064-91	387
Motor vehicle sales act to factors or commission merchants; license tax requirements	063-35	52
Motorized carts, license or tax exemption situs	064-8	255
Nonresident; employed in another state; short period employment in state for employer; license tag, requirements	064-44	310
Secondhand dealers, removing business from original location; new license required	064-92	388
Towing by means of towbar on interstate highways, legal requirements	064-152	476

MOTORBOATS

Boats or vessels propelled or powered by motors more than 10 horsepower; license tax	063-78	122
Licensed and registered under U. S. laws; tax situs	063-97	150
Personal property tax; exemption	063-78	122
	063-80	126

MUNICIPAL COURT See: MUNICIPALITIES

MUNICIPALITIES

Alleged incompetent detained in municipal hospital under order of court; county expense, payment ..	064-88	381
Audits of accounts by state auditor; deposit in es- crow, estimated cost; allowance permitted	064-162	488
Elections See: ELECTIONS		
Firemen's and policemen's pension trust funds; pub- lic safety employees participation; eligibility	063-130	193
Firemen's pension fund; persons other than fire- men; eligibility to participate in	063-134	201
Governmental agencies; tax returns; construction Ch. 63-342; requirements	063-138	206
Homestead exemption, application for; filing with municipality not required; exception	064-169	494
Municipal court		
Process, service in another city in same county; legality	064-36	296
Public defenders; required to relinquish position of city prosecutor	063-81	127
Municipal electric plant, authority to underwrite part of purchase price of electrical appliances sold to private individuals for further sale of electricity; legality	063-63	99
Municipal fund; investment in federal savings and loan associations; authorized	063-41	63
Municipal purposes, relating to taxes and tax ex- emptions; defined	063-36	54
Parking meters; disabled persons, exemption from payment of parking fees	064-153	477
Police department		
Lottery promotion, person suspected of; author- ity of police officer to arrest without warrant ..	064-154	478
Police record of child accused of felony; release of information; prohibited	064-43	307
Property owned by state, county or city; lease con- tracts prior to 6/16/61; tax situs	063-73	113
Real estate brokers and salesmen; occupational license tax liability	064-23	279
Real property, title; as affected by avulsion, accre- tion and erosion; tax situs	063-50	77
Submerged lands regained from erosion control de- vices, title; tax situs	063-50	77
Wholesalers transacting business from vehicles to municipalities elsewhere; occupational license situs	064-112	413

—N—

NATURAL GAS; construction of §203.01, F. S.; defines meaning of term of	064-50	319
NAVAL STATION, U. S.; military recreational facilities; gasoline sales for; tax exemption	064-106	405
NAVIGABLE WATERS; privately owned lands covered by navigable waters when used for commercial purposes; tax situs	064-65	345
NEIGHBORHOOD YOUTH CORPS PROJECT; educational function; federal funds; contracts with certain agencies for carrying out program	064-176	510
NEW YORK WORLD'S FAIR; junior colleges; use of school funds for participation in educational section; legality	064-55	328

NEWSPAPERS

Entry as second class matter; qualified for publication of legal notices	064-150	474
Hospital release of information concerning deaths of patients prior to certain conditions	064-78	366

NONRESIDENTS

Employed in another state; short period employment in state for employer; driver's license and motor vehicle tag; requirements	064-44	310
Estates; resident personal representatives; tangible personal property tax; tax situs	063-1	1
Small claims court; acquiring jurisdiction over person outside Florida	064-75	357
NORTHWESTERN PALM BEACH COUNTY PUBLIC HOSPITAL BOARD; new hospital structure; mechanics' lien law; application to	064-98	395

NOTARY PUBLIC

Conviction of felony in federal court; effect of right to act in state	063-91	140
Employee in clerk of circuit court offices; performing services of notary public; notarial fees	064-81	369
Minors; disabilities of nonage removed; eligibility for appointment	063-111	168
NURSERY SCHOOLS; educational institutions, operating as; standard requirements; courses of study, etc., tax exemptions	063-34	50
NURSING HOMES; homes for the aged as contemplated Ch. 400, F. S., license requirements; advertisements	063-126	187

—O—

OIL AND GAS; county property, authority of county commissioners to enter into lease agreements with private companies	064-149	472
OSCEOLA COUNTY; revenue certificates, issuance; by school board; maximum limitations	063-52	81

	<i>Opinion Page</i>	
OPTOMETRISTS; contact lenses; fitting or adapting to eyes and face of patient other than by licensed physician or optometrist; legality	063-144	216
ORANGE COUNTY; boys' clubs, property leased and used by; tax exempt status	063-146	222

—P—

PARKING METERS; disabled persons, exemption from payment of parking fees	064-153	477
--	---------	-----

PER DIEM

Circuit judges; headquarters established at location other than county seat; travel and per diem allowance	064-21	277
County officers and employees, per diem and travel allowances; authority of county commissioners ..	063-117	177
Definition of convention and conference as used in §112.06, F. S.	063-95	147
Election officials; jurors and witnesses serving at precincts; compensation	063-119	179
Law enforcement officers appearing as witnesses; per diem and traveling expense allowances	063-114	172
Pharmacy board members, per diem and travel expenses	064-141	455
State officer confined to a day or less travel; allowance	064-2	248
PHARMACY, BOARD OF; members, per diem and travel allowance	064-141	455
PHILHARMONIC ASSOCIATIONS; admissions and membership subscriptions; sales tax exemption	063-132	196
PHYSICIANS AND SURGEONS; medical doctors, contracts in restraint of practice of medicine, prohibited	064-121	425

PINELLAS COUNTY

County administrator, authority; construction of Ch. 63-575 as to authority of county commissioners and administrator	064-24	280
Juvenile welfare board		
Allocation of public tax funds to certain private agencies; prohibitive	064-101	399
Budget; authority of county commissioners to delete certain items	064-101	399

POLICE DEPARTMENT See: MUNICIPALITIES

POLITICAL CAMPAIGNS See: ELECTIONS

POLITICAL PARTY See: ELECTIONS

POLK COUNTY; superintendent of public instruction; salary	064-29	286
POOL AND BILLIARDS; minors as members of social clubs, playing by; legality	063-16	23

PRACTICE OF MEDICINE See: MEDICINE,
PRACTICE OF

	<i>Opinion</i>	<i>Page</i>
PRELIMINARY HEARINGS; statements and confessions, furnishing to accused	064-107	406
PRE-NEED BURIAL CONTRACTS; sale of vaults or burial supplies; compliance with Ch. 639, F. S. ..	064-148	471
PRINTING; legislative printing; contracts covering certain printing, divided; permissible	064-170	495
PRISONERS		
Criminal procedure; rule 1; effect upon term of imprisonment	063-62	95
Release of; clothing and payments to; transportation; division of corrections, responsibilities	063-57	87
PROBATE LAW		
Contract for sale and conveyance of realty; non-resident entered into prior death; measure of tax	063-32	47
Estate and inheritance taxes; nonresident of Florida; property in state and foreign country; calculation	063-140	209
Estates of decedents, intangible personal property taxes and tax liens; estate closed prior to certain date; status of unpaid taxes	063-24	32
Intangible personal property liens, tax assessment; authority to discharge without payment	064-35	294
Nonresident estates; resident personal representatives; tangible personal property tax; tax situs ..	063-1	1
PROCESS		
Constables; civil cases, fees allowed for service of summons or writs; remittance; applicability of Ch. 63-41	063-96	149
Municipal court, service in another city in same county; legality	064-36	296
Sheriffs' fees		
Certain writs; service	063-98	151
Process service or return and copy of nonexecution of process	063-75	116
Witness subpoenas in criminal proceedings; service	063-101	156
PROFESSIONAL SERVICE CORPORATIONS;		
stock issued by; tax situs	064-30	287
PROMISSORY NOTES		
Modification of extension of; tax situs	063-141	209
Mortgage, additional advances secured by; note used in connection with; tax situs	064-49	317
Renewal of note and new advance; secured by mortgage; tax situs	063-44	71
PROMOTIONAL CAMPAIGNS; awarding of gifts under certain conditions, whether violative of Ch. 63-553	063-124	184
PROSECUTING ATTORNEY; employment by county; limitation of compensation; reports, filing requirements	063-113	171

	<i>Opinion</i>	<i>Page</i>
PUBLIC AGENCIES; tax sheltered annuities, purchase of; deductions for cost; retirement benefits, computing final average	064-27	285
PUBLIC CONSTRUCTION; mechanics' lien law; application to	064-98	395
PUBLIC DEFENDERS		
Appeals		
Filing fees; payment, fine and forfeiture fund	064-158	483
Orders denying collateral attacks under criminal procedure rule 1; duty under certain circumstances	064-77	361
Assistants, travel allowances, payment; funds	063-77	120
Convictions of insolvent defendant, appeals from; duty	064-77	361
Court reporter, services requested; insolvent defendant; payment of charges	064-144	460
Insolvent defendant; probation revocations; habeas corpus proceedings, duties re	064-77	361
Multiple defendants, conflict of interest; representation	063-105	161
Office and travel expenses, payments; funds	063-77	120
Private practice of criminal law		
Prohibited under certain conditions	064-77	361
Required to relinquish position of prosecutor in municipal court	063-81	127
Representing several counties in judicial circuit; office expenses, payment	063-82	127
Statement of claim; procedure for filing liens on property on certain indigents; payment of expenses, etc.	063-90	137
Witnesses, subpoena		
Authority of public defender; compensation of witness	064-83	374
Testimony regarding solvency of defendant; without authority	064-77	361
PUBLIC LODGING; municipal ordinance, violation of; revocation or suspension of license prohibitive ..	064-76	359
PUBLIC OFFICIALS		
Cancel, release or compromise taxes, authority and power of public officers	064-67	348
Holding office without commission prior to filing bond; compensation	064-99	396
Witnesses, appearing as before grand juries or prosecuting officers; compensation	064-69	349
PUBLIC UTILITY ARBITRATION LAW; labor disputes, state rights to invoke compulsory arbitration; legality	063-86	133
—R—		
RACING; jai alai frontons; operating days; maximum allotment allowed by racing commission	064-157	481
RADIO BROADCASTING STATION; promotional contest; whether violative of lottery law	063-49	76

REAL ESTATE BROKERS AND SALESMEN

Mortgage brokers prohibited to enter certain agreements for compensation with	064-71	355
Occupational license taxes imposed by municipalities; liability	064-23	279
Real estate brokers not engaged in practice of profession, occupational license requirement	064-123	428

REAL PROPERTY

Condominium property; sale of parcels; rights and interest therein; legality of titles	064-62	336
Contracts or agreement for sale of realty; tax situs	064-60	332
Home improvement contractors, negotiation of mortgage loans by; license requirements under mortgage brokerage act	064-38	298
Mineral, oil, gas, other subsurface rights in or to real estate; method of assessment	063-125	185
Mortgage encumbering real property; obligations, execution on base; tax situs	064-58	329
Omitted properties, back assessments; legality	064-139	450
Options; purchase and sales contracts; binder agreements; documentary stamp tax situs	063-116	175
Ownership by two or more persons; assessment and redemption of taxes thereon	063-43	68
Privately owned lands covered by navigable waters when used for commercial purposes; tax situs	064-65	345
Promotional site; contest; prize awards; whether violative	064-46	313
Property insufficiently valued for years; back assessments; legality	064-139	450
Real and personal property; owned by foreign nations as home and office of their consul; tax situs	063-45	72
Sale of from U. S. to Hillsborough county port authority; tax situs	063-131	195
Spoil deposit easements granted; tax exempt status of lands	064-181	517
Title; as affected by avulsion, accretion and erosion; tax situs	063-50	77
Undivided fee interests in real property; assessment and redemption of taxes thereon	063-43	68
RECORD; carbon copy of instrument, originally signed; recording	063-108	164
RECREATIONAL PARKS; religious organizations and groups, owned by; tax situs	064-34	293
REFUNDS; tax refunds under §193.40, F. S.; payment from certain fund	064-22	278
RELIGIOUS ORGANIZATIONS; recreational parks owned by; ad valorem tax situs	064-34	293
RENT, DISTRESS FOR; issuance of writ; requirements and approval of bonds and sureties	063-109	165
REPLEVIN; issuance of writ; requirements and approval of bonds and sureties	063-109	165
RESIDENCE AND DOMICILE; elector; participation in election when home divided by boundary line	063-31	45

REST HOMES; services for the aged, furnishing of certain; advertisements; license requirements	063-126	187
RESTAURANTS; enforcement officers; physical removal of persons from restaurants; authority	063-71	109
RESTORATION OF CIVIL RIGHTS		
Incompetent person temporarily committed; civil rights automatically restored	064-51	322
Person adjudged guilty and placed on probation loses civil rights privileges; restoration required	064-163	489
Petit larceny conviction; person's civil rights not restored; right to vote	064-87	380
RETAIL INSTALLMENT SALES		
Banking institutions; financing of purchase installment contracts; legality	063-33	49
Motor vehicle sales act to factors or commission merchants; license tax requirements	063-35	52
RETAIL STORES		
Alteration of purchased clothing; situs of sales tax	063-89	136
Promotional programs; awarding of gifts under certain conditions, whether violative of Ch. 63-553	063-124	184
RETIREMENT SYSTEMS		
Chapter 63-555, effective date of	063-94	145
Circuit judges; prior services by; resuming office again; retirement benefits under Ch. 38, F. S.	064-19	273
County development authorities, officers and employees, eligibility	064-33	291
District courts of appeal; judge, prior credit under judges' retirement for service as state employee	063-139	208
Jacksonville-Duval area planning board; officers and employees as member of retirement system; status	063-61	94
Jacksonville port authority; employees of; status of retirement; Duval county employees pension fund	064-156	479
Municipal employee retirement plan held by trustee; intangible personal property tax situs	063-135	202
Municipalities; firemen's and policemen's pension trust funds; public safety employees participation; eligibility	063-130	193
Retired state or county employee serving on examining committee under §394.22, F. S.; effect	063-42	67
State and county officers and employees		
Beneficiary, designation of; change of beneficiary by will; effect	063-110	167
Campbellton-Graceville hospital district; employees of; eligibility	064-127	431
Chapter 63-555, effective date	063-94	145
"Continuously employed"; construction of phrase	063-147	224
County development authorities, officers and employees, eligibility	064-33	291
Sheriffs performing high hazard duties; Ch. 63-555, effective date	063-94	145

	<i>Opinion Page</i>	
RETIREMENT SYSTEMS (cont.)		
Tax sheltered annuities, purchase of; deductions for cost; retirement benefits, computing final average	063-160	244
	064-27	285
Teachers		
Seventy years or older, employment; authority of board	064-26	284
Tax sheltered annuities, purchased by officers and employees; deduction for; retirement pay, determining	063-160	244
ROADS AND BRIDGES; annual contracts for road surfacing on square yard basis; county commissioners, authority	064-120	424
—S—		
ST. LUCIE COUNTY; clerk of circuit court; compensation; authorized from other portions by special acts, included as income of office	064-159	484
SALES; Home-A-Rama operators and tenants; sales of goods from stalls or compartment; tax situs	063-68	105
SALES TAX		
Agricultural fairs, admissions; tax situs	063-123	182
Bad checks, unpaid; procedure for collection	063-74	115
Boats or vessels, chartered or rented on certain basis; tax situs	064-9	256
Philharmonic associations, little theatres, etc.; admissions and membership subscriptions, exemption	063-132	196
Retail clothing stores; alteration of purchased articles; tax situs	063-89	136
Rodeo performance operated by Sumter All-Florida Breeders' Show and County Fair; admissions or gate receipts; exemption	063-157	238
SANITARIANS' REGISTRATION BOARD; state health officer, ex officio member, delegation of authority; legality	064-110	408
SANITARY SEWER DISTRICTS; special assessments, collection; compensation of tax collector	063-127	190
SCHOOL BOARDS See: COUNTY BOARDS OF PUBLIC INSTRUCTION		
SCHOOLS		
Board of trustees; personnel, authority of board with reference to recommendation	064-100	397
Buses, installation of additional signal lights; authority of school board	063-149	226
Contracts continuing, granting by school board to superintendent on expiration of term of office ..	064-74	356

SCHOOLS (cont.)

County superintendent of public instruction See:
SUPERINTENDENT OF PUBLIC INSTRUCTION, COUNTY

Employees, political participation by; prohibited	063-69	107
Equipment, lease agreements on, by school board, for use in school system; insurance; term of lease, etc.	063-53	81
Neighborhood youth corps; federal funds; use of certain funds to perform the necessary educational functions required by board	064-176	510
Sale of land and school property, contract for; authority of board	063-59	91

School boards See: COUNTY BOARDS OF
PUBLIC INSTRUCTION

School funds

Depository of; officer of bank, unpaid educational committee member; qualification of bank as depository	063-118	178
Deposits, pro rata share of; qualification as county depositories	064-25	282
Investment and deposit; security; insurance coverage, etc.	064-111	409
School lunch program and other internal school funds; custody, disbursement and nature of	063-143	214
School property, disposal; authority of school board	064-86	379
School trustees, school activities carried on in school buildings or athletic fields, control and authority	064-142	457

Superintendent of public instruction, county See:
SUPERINTENDENT OF PUBLIC
INSTRUCTION, COUNTY

Teachers

Competence awards

Examinations; requirements; payment	063-2	2
Funds for payment; not limited by 1963 appropriations act	064-1	245
Continuing contracts, qualifications for	063-120	180
Examinations; authenticated scores, furnishing of by examining agency; authority of agency ..	064-56	328
Retirement See: RETIREMENT SYSTEMS		
Seventy years or older, employment; authority of board	064-26	284

SEARCH WARRANTS; constables; execution of, in district other than own; legality	063-58	90
---	--------	----

SECONDHAND MOTOR VEHICLE DEALER; business removed from original location; new license required	064-92	388
--	--------	-----

SECURITIES COMMISSION, FLORIDA; Florida Peach Orchards, Inc.; performance guarantee as part of sales contract; within definition of security	064-177	511
--	---------	-----

	<i>Opinion Page</i>	
SHERIFFS		
Bond approval fee prior conviction of defendant; collection prohibited	063-30	44
Deputy		
Hold over to new administration, renewal of bond; requirement	064-180	516
Serving at precinct polling places; compensation	063-119	179
Employees, reimbursement for loss of personal property destroyed in line of duty; prohibited	063-85	132
Fees		
Connection with service of certain writs	063-98	151
Service of witness subpoenas in criminal proceedings	063-101	156
High hazard duties, performing; Ch. 63-555, effective date	063-94	145
Process service or return and copy of nonexecution of process, fees	063-75	116
SHERIFFS BUREAU; felons, registration; requirements	063-66	102
SMALL BUSINESS; loans under §631, et seq., Title 15, U. S. Code, tax situs	063-51	79
SMALL CLAIMS COURTS		
Commencement of actions; plaintiff or his agent, construction to reference	064-64	343
Foreign corporation, posting of cost bond by	064-179	515
Nonresident, acquiring jurisdiction over; jurisdiction of court	064-75	357
SOCIAL CLUBS; minors as members; sale of alcoholic beverages to; billiards and pool playing by, etc.; legality	063-16	23
SOCIAL SECURITY		
Circuit judges retired under Ch. 123; F. S.; prior to establishment of divisions A-C; transfer for coverage; eligibility	063-159	241
Vocational rehabilitation counselors, subpoena concerning certain records; procedure for releasing	064-103	400
SOUTH MIAMI, CITY OF; taxes, assessment and collection of; on Dade county tax rolls; permitted ..	063-137	204
STAMP COLLECTIONS; ad valorem tax situs; standard of valuation	063-87	134
STATE AGENCIES		
Dismissal of employees under its own internal rules; application of administrative procedure act	064-167	493
Governmental agencies; tax returns; construction of Ch. 63-342; requirements	063-138	206
Tax sheltered annuities, purchase of; deductions for cost; retirement benefits, computing final average	064-27	285
STATE AND COUNTY OFFICERS AND EMPLOYEES; retired state or county employee serving on examining committee under §394.22, F. S.; effect	063-42	67

	<i>Opinion</i>	<i>Page</i>
STATE ATTORNEYS; assistant state attorney; travel expenses reimbursed; authorized	063-72	110
STATE AUDITING DEPARTMENT See: AUDITING DEPARTMENT, STATE		
STATE BOARD OF CONSERVATION See: CONSERVATION, STATE BOARD OF		
STATE BOARD OF HEALTH See: HEALTH		
STATE BUDGET COMMISSION See: BUDGET COMMISSION, STATE		
STATE DEPOSITORIES; bonds issued by Georgia authorities; not acceptable for deposit by state depositories	063-39	59
STATE HOSPITAL; incompetent person temporarily committed; civil rights automatically restored	064-51	322
STATE OF FLORIDA		
Mechanics' lien law; property owned by state; notice to owner by subcontractors; requirement	064-122	427
Property owned by state, county or city; lease contracts prior to 6/16/61; tax situs	063-73	113
STATE OFFICERS AND EMPLOYEES; dismissal of employees under certain state agencies rules; application of administrative procedure act	064-167	493
STATE ROAD DEPARTMENT		
Federal highway reimbursement funds; disposition	063-56	85
Highlands county; bids on certain job; contract award, condition	063-158	240
STOCKS, SHARES OF See: CORPORATE STOCK		
STOLEN PROPERTY; purchase, concealment, etc.; restitution made; effect of reducing crime	064-17	272
SUBMERGED LANDS; regained lands through erosion control devices; title; tax situs	063-50	77
SUBSURFACE RIGHTS; mineral, oil, gas, other subsurface rights in or to real estate; method of assessment	063-125	185
SUMMONS		
Service of See: PROCESS		
SUMTER ALL-FLORIDA BREEDERS' SHOW AND COUNTY FAIR; admissions or gate receipts, not subject to sales tax; Lions club and 4-H council, sale of food and drinks by; subject to sales tax	063-157	238
SUPERINTENDENT OF PUBLIC INSTRUCTION, COUNTY		
Appointive		
Commissions upon appointment; procedure	064-164	491
Qualifications as to residence and registered elector	064-182	519

	<i>Opinion</i>	<i>Page</i>
SUPERINTENDENT OF PUBLIC INSTRUCTION, COUNTY (cont.)		
Appointive (cont.)		
Term of office; removal by governor; constitutional officers, etc.	064-85	378
Appointment		
Beginning January 5, 1965; duty of new school board	064-182	519
Election to determine appointment or election; procedure for holding	063-25	33
Continuing contract as a teacher, principal or supervisor; granted by school board on expiration of term of office	064-74	356
Educational requirements; qualifications, etc.; school board, authority	063-28	41
Election, resubmitting appointive issue to electorate; interval of time	063-129	191
Personnel, authority of superintendent with reference to recommendation	064-100	397
Polk county, salary	064-29	286
SURETIES; writs of attachment, replevin, distress for rent, garnishment and appeals; approval of bonds and sureties prior to issuance by clerk	063-109	165
SURETY BONDS		
Defendant's fine and costs bond; arrested under parole violation; sureties on bond, obligations	063-19	28
Secured for performance of obligation; intangible personal property; tax situs	063-6	8
SURFSIDE, TOWN OF; employees' retirement plan held by trustee; intangible personal property tax status	063-135	202
SWEEPSTAKES; nation-wide advertising promotion program; violative of lottery law	063-153	231

—T—

TAX COLLECTORS See: TAXATION

TAXATION

Agricultural lands		
Tax assessment on lower valuation in prior year; refunds	064-7	254
Zoning; assessment, valuation, etc.	064-90	385
Antiques and stamp collections, tax situs; standard of valuation	063-87	134
Assessments		
Errors made in connection with; procedure for corrections	064-13	266
Omitted properties, back assessments; legality ..	064-139	450
Property insufficiently valued for years; back assessments; legality	064-139	450
Assessors		
Central and southern flood control district; tax assessments and collections in several counties; measure of compensation	064-93	388

TAXATION (cont.)

Assessors (cont.)

Courses in property appraisal; certificate fee, dues in membership association; whether proper charges as office expense	064-136	447
Omitted properties, back assessments; legality ..	064-139	450
Property insufficiently valued for years; back assessments; legality	064-139	450
Bankruptcy; trustees in; refunds of penalties in connection with delinquent taxes; payment authorized	063-60	93
Blood banks; Leon county blood bank trust, non-profit; tax situs	063-17	25
Boats or vessels		
Personal property tax, exemption	063-78	122
	063-80	126
Registered and licensed, U. S. laws; tax situs	063-97	150
Tax assessments against; cancellation	063-128	191
Boys' clubs, property leased and used by; tax exempt status	063-146	222
Cancel, release or compromise taxes, authority and power of public officers	064-67	348
Cemetery; trust funds for maintenance and care; intangible personal property tax; status	063-3	4
Central and southern Florida flood control district		
Mangrove islands and growth as land; district tax situs	064-61	334
Tax assessments and collections in several counties; measure of compensation	064-93	388
Collectors		
Central and southern Florida flood control district; tax assessments and collections in several counties; measure of compensation	064-93	388
Motor vehicle license plates obtained by worthless check; demand upon applicant for surrender ..	064-91	387
Sanitary sewer districts, collection of special assessments for; compensation	063-127	190
Comptroller and state budget commission in connection with equal and uniform tax, obligations and powers	064-171	497
Condominium property		
Apartments; records and recording required for tax assessment purposes	063-27	39
Building constructed in air space above surface of ground; separate tax situs	064-70	352
Parcels; homestead exemption rights; tax status	064-20	275
Contracts or agreements for deeds, intangible tax amount assessed and payable on	064-135	445
Cooperative apartment; share of stock or interest in, transfer of; tax situs	064-41	302
Corporate stock; value of, for tax purposes when not listed or sold on markets; elements to determine	063-154	233

TAXATION (cont.)

Dade county, revaluation of taxable property; authority of legislature to enact legislation postponing court decision; prohibited	064-116	416
Delinquent taxes, real or personal property; tax sale, time of; notices to taxpayers, publication ..	063-76	117
Documentary stamp tax		
Conveyances; interlocking corporate interests and subsidiaries; tax situs	063-18	26
Insurance premium financing arrangements and contract agreements; tax situs	063-38	57
Military bases, documents executed on; tax situs ..	063-136	203
Professional service corporations, stock issued by; tax situs	064-30	287
Promissory notes		
Modification of extension of; tax situs	063-141	209
Original mortgage obligation, used in connection with; additional notices, tax situs	064-49	317
Real property		
Options, purchase and sale contracts, binder agreements relating to; tax situs	063-116	175
Sale of from U. S. to Hillsborough county port authority; tax situs	063-131	195
Stock		
Dividends and stock splits, original issue; exercise tax situs	063-7	9
Transactions, tax situs	063-107	163
Wholesale warehouse mortgage agreements; principal obligation, etc.; tax situs	064-82	371
Dredges, barges, boats, and vessels not subject to licenses; tax situs	063-97	150
Dwelling units which overlap or encroach on each other; separate assessment situs	063-15	21
Educational institution; construction of school plant; when rights to tax exemption attaches	063-92	140
Equalization board		
Duties and powers; general re tax equalization ..	064-140	452
Reconvening after adjournment to correct certain errors; permitted	064-151	475
Errors made in connection with assessments, procedure for corrections	064-13	266
Estate and inheritance taxes; nonresident of Florida; property in state and foreign country calculation	063-140	209
Estates of decedents, intangible personal property taxes and tax liens; estate closed prior to certain date; status of unpaid taxes	063-24	32
Exemptions		
Blood banks; Leon county blood bank trust, non-profit; tax situs	063-17	25
Homes maintained for retired Methodist preachers; nonprofit corporation; tax situs	063-5	6
Property owned by state, county or city; lease contracts prior to 6/16/61; tax situs	063-73	113

	<i>Opinion Page</i>	
TAXATION (cont.)		
Gasoline tax; military recreational facilities; exemption	064-106	405
Governmental agencies; tax returns; construction Ch. 63-342; requirements	063-138	206
Homes maintained for retired Methodist preachers; nonprofit corporation; tax situs	063-5	6
Homestead exemptions		
Any one dwelling house, construction of phrase ..	064-128	432
Application for exemption filed with municipal officer not required; exception	064-169	494
Construction of 1964 constitutional amendment; assessments and limitations; affect of amendment on Art. IX §9, of Florida constitution	064-178	514
Husband and wife		
Claims by, in different counties; tax situs	063-9	12
Separate exemptions, claims for; prohibited	064-5	251
Joint tenancies; occupancy by one joint tenant; rights	063-29	43
Mentally incompetent owner, committed to state hospital; rental of homestead; tax situs	063-8	11
Minors		
Temporary aliens; property owners; permanent resident with parents; tax situs	063-10	13
Unmarried, living with parents, residing on property owned by him; tax exemption	063-47	75
Row housing; party or common wall, common or contiguous roof; separate exemption; tax situs ..	063-151	228
House trailers, tax against; when and how enforced ..	063-40	62
Industrial development corporations organized under Ch. 289, F. S.; tax exemption status	064-6	253
Intangible personal property		
Cemetery trust funds for maintenance and care; tax situs	063-3	4
Liens on; tax assessment; authority to discharge without payment	064-35	294
Loans under §631, et seq., Title 15, U. S. Code; tax situs	063-51	79
Military base, obligations executed on; tax situs ..	064-58	329
Municipal employee retirement plan held by trustee; tax situs	063-135	202
Nonresident estates; resident personal representatives; tax situs	063-1	1
Promissory note; renewal of note and new advance; secured by mortgage; tax situs	063-44	71
Real property		
Contracts for sale of; tax situs	064-60	332
Options, purchase and sale contracts, binder agreements relating to; tax situs	063-116	175
Records of certain obligations not personally binding, tax situs	064-12	264
Surety bonds secured for performance obligations; tax situs	063-6	8

TAXATION (cont.)

Intangible personal property (cont.)

Testamentary trustee, intangibles vested in and held by; moves domicile to another state; tax situs	063-11	16
Trust agreements, settlor's reserved rights to revoke or amend; tax situs	064-104	402
Intangible taxes on contracts and agreements for deeds; amount assessed and payable	064-135	445
Kindergartens; educational institutions, operating as; standard requirements; courses of study, etc., tax exemptions	063-34	50
Lands encumbered by spoil disposal easements conveyed by landowners; tax situs	064-105	404, 517
Liquefied petroleum gas, sale to certain consumers; tax situs	063-100	154
Mentally incompetent owner, committed to state hospital; rental of homestead; tax situs	063-8	11
Military base; intangible personal property taxes; obligations executed on; tax situs	064-58	329
Military recreational facilities; gasoline sales for; tax exemption	064-106	405
Millage increases on real or tangible property; public notice not required	064-124	429
Mineral, oil, gas, other subsurface rights in or to real estate; method of assessment	063-125	185
Minors, temporary aliens; property owners; permanent resident with parents; homestead exemption	063-10	13
Motorized carts, license or tax exemption situs	064-8	255
Municipal purposes, relating to taxes and tax exemptions; defined	063-36	54
Nonresident estates, resident personal representatives; tangible personal property tax; tax situs ..	063-1	1
Nursery schools; educational institutions, operating as; standard requirements; courses of study, etc., tax exemptions	063-34	50
Occupational license tax See: LICENSES AND LICENSE TAXES		

Personal property

Owned by foreign nations as home and office of their consul; tax situs	063-45	72
Tax; boats or vessels, tax exemption	063-78	122
	063-80	126
Privately owned lands covered by navigable waters when used for commercial purposes; tax situs	064-65	345
Property owned by state, county or city; lease contracts prior to 6/16/61; tax situs	063-73	113
Real property		
Contracts or agreement for sale of realty; tax situs	064-60	332
Deed held by foreign nations as home and office of their consul; tax situs	063-45	72

TAXATION (cont.)

Real property (cont.)

Master appraiser's rating and dues for membership in association; certificate fee; whether proper charges of assessor's office	064-136	447
Millage increases; public notice not required	064-124	429
Mortgage encumbering realty; military bases; tax situs	064-58	329
Omitted properties, back assessments; legality	064-139	450
Owned by foreign nations as home and office of their consul; tax situs	063-45	72
Ownership by two or more persons; assessment and redemption of taxes thereon	063-43	68
Property insufficiently valued for years; back assessments; legality	064-139	450
Short courses in property appraisal; whether proper charges of assessor's office	064-136	447
Title of; as affected by avulsion, accretion and erosion; tax situs	063-50	77
Recreational parks; religious organizations and groups, owned by; tax situs	064-34	293
Refunds of tax		
Paid where no tax due	064-54	326
Under §193.40, F. S.; payment from certain fund	064-22	278
Sale of property for delinquent tax; time	063-76	117
Sales tax See: SALES TAX		
South Miami; assessment and collection of taxes on county tax rolls; permitted	063-137	204
Spoil deposit easements granted; tax exempt status of lands	064-181	517
Stock dividends and stock splits, original issue; excise tax situs	063-7	9
Submerged lands regained from erosion control devices, title; tax situs	063-50	77
Surety bonds secured for performance of obligation; intangible personal property; tax situs	063-6	8
Tangible personal property		
Real and personal property		
Millage increases; public notice not required ..	064-124	429
Owned by foreign nations as home and office of their consul; tax situs	063-45	72
Tax against, when and how enforced	063-40	62
Tax deed sales		
Holding on holiday permitted	063-79	125
Payment of bid at; requirement	063-65	101
Tax rolls, delivered after November first; discount allowed	063-76	117
Testamentary trustee, intangibles vested in and held by; moves domicile to another state; tax situs ..	063-11	16
Trust agreements, settlor's reserved rights to revoke or amend; tax situs	064-104	402
Trust fund holding only Florida nontaxable municipal securities; certificates held by Florida residents; exemption	064-143	458

TAXATION (cont.)

Trust, profit-sharing; benefit of employees; tax situs	063-156	237
Undivided fee interests in real property; assessment and redemption of taxes thereon	063-43	68
Unit investment trust established under Investment Act 1940; certificates held by Florida residents; tax situs	064-143	458

TEACHERS See: SCHOOLS

TESTAMENTARY TRUSTEE; intangibles vested in and held by; moves domicile to another state; tax situs	063-11	16
TOWING; motor vehicles by means of towbar on interstate highways; legal requirements	064-152	476
TRAILERS; tangible personal property, taxes, when and how enforceable	063-40	62

TRAVEL EXPENSES

Assistant state attorney; travel expenses reimbursed, authorized	063-72	110
Circuit judges; headquarters established at location other than county seat; travel and per diem allowance	064-21	277
County judge, travel expense between county seat and auxiliary court; payment	064-118	421
County officers and employees, per diem and travel allowances; authority of county commissioners ..	063-117	177
Definition of convention and conference as used in §112.06, F. S.	063-95	147
Election officials; jurors and witnesses serving at precincts; compensation	063-119	179
Law enforcement officers appearing as witnesses; per diem and traveling expense allowances	063-114	172
Pharmacy board members, per diem and travel expenses	064-141	455
State officer confined to a day or less travel; allowance	064-2	248
TRIALS; retrial of persons accused of crime under criminal procedure rule 1; costs and expenses, payments	063-115	174
TRUST AGREEMENTS; settlor's reserved rights to revoke or amend trust; intangible personal property tax situs	064-104	402
TRUSTEES, INTERNAL IMPROVEMENT FUND; division of beaches and shores; permits for installation of piers, docks, wharves, etc.; jurisdiction of trustees	063-67	103

TRUSTS

Profit-sharing for benefit of employees, tax situs ..	063-156	237
Trust fund holding only Florida nontaxable municipal securities; certificates held by Florida residents; tax exemptions	064-143	458

TRUSTS (cont.)

Unit investment trust established under Investment Act 1940; certificates held by Florida residents; tax situs	064-143	458
--	---------	-----

—U—

UNCLAIMED FUNDS; construction of certain sections; clerk of circuit court re	064-47	315
UNEMPLOYMENT COMPENSATION; employee, compensation accruing to and at time of death; disposition	063-122	181

—V—

VESSELS

Boats or vessels propelled or powered by motors more than 10 horsepower; license tax	063-78	122
Chartered or rented on certain bases, sales tax status	063-80	126
Licensed and registered under U. S. laws, tax situs	064-9	256
Personal property tax; exemption	063-97	150
VOCATIONAL REHABILITATION; social security and vocational rehabilitation records and documents, subpoena re; procedure for releasing	063-78	122
VOLUSIA COUNTY; county judge, travel expense between county seat and auxiliary court; payment	063-80	126
	064-103	400
	064-118	421

—W—

WAGES

Employee, compensation accruing to and at time of death; disposition	063-122	181
Public contractors; prevailing wage law, meaning of "any aggrieved party" used in	064-10	260
WATCHMAN, GUARD AND PATROL AGENCIES; armored car services; watchman, guards and patrolmen, employment; not within purview of Ch. 493, F. S.	063-145	220
WATER MANAGEMENT DISTRICT; board of governors, terms of office; boundary changes	063-64	100
WATER SUPPLY SYSTEM; subdivision developer; supplying 25 or more persons; state board of health approval	064-80	368
WHOLESALE WAREHOUSE MORTGAGE AGREEMENTS; definition; principal obligations; exemption from excise taxes	064-82	371
WHOLESALESAERS; transaction of business from vehicles to municipalities elsewhere; occupational license tax	064-112	413
WILLS; estate and inheritance taxes; nonresident of Florida; property in state and foreign country; calculation	063-140	209

WITNESSES

Precinct polling places, serving at; compensation ..	063-119	179
Public defender; authority to subpoena, etc.	064-77	361
	064-83	374
Public officers appearing as witnesses before grand juries or prosecuting officers; compensation	064-69	349

WORKMEN'S COMPENSATION LAW

Chiropractors, medical services furnished by; rights of employer or his carrier	064-11	263
Medical services, furnishing to injured employee; rights of employer or his carrier	064-11	263

WRITS

Service of See: PROCESS

CITATOR

CITATOR TO FLORIDA STATUTES, LAWS OF FLORIDA AND STATE CONSTITUTION, CONSTRUED AND CITED IN OPINIONS RENDERED BETWEEN JANUARY 1, 1963, THROUGH DECEMBER 31, 1964.

FLORIDA STATUTES

Section	Opinion	Page	Section	Opinion	Page
1.01	63-100	154	28.24	63-106	162
1.01(10)	63-6	8		63-152	230
	63-135	202		64-81	369
2.01	64-63	341		64-83	374
11.03, 11.05	63-26	36	28.241	64-83	374
11.12(2)	63-13	19		64-158	483
11.13	64-141	455		64-165	491
11.15(3)	63-13	19	28.29	64-89	383
13.01, 13.24	64-141	455	29.02	64-144	460
16.19	64-141	455	29.03, 29.04	64-66	346
16.20	64-130	437		64-144	460
	64-141	455	30.23	63-30	44
16.21-16.24	64-141	455		63-75	116
16.44	64-141	455		63-96	149
18.10	63-39	59		63-98	151
	63-41	63	30.231	63-96	149
	63-104	159		63-98	151
18.11	63-39	59	30.231(1)	63-75	116
	63-41	63		63-96	149
	63-104	159		63-98	151
18.111	63-41	63	30.231(2)	63-75	116
25.241(3)	64-158	483		63-96	149
26.52	64-21	277	30.49	64-129	434
27.14, 27.15	63-72	110	30.51(1)	63-101	156
27.21, 27.22	63-72	110	34.20, 34.21	64-94	390
27.29-27.31	63-72	110		64-159	484
27.50-27.54	63-77	120	37.16	63-58	90
	63-90	137	38.14-38.19	64-19	273
	64-77	361	39.01(6), (11)	64-43	307
	64-83	374	39.02(1)	63-99	152
27.51	63-90	137		64-43	307
	64-83	374	39.02(6)	64-43	307
27.51(1)	64-77	361	39.03(3)	64-43	307
27.51(3)	63-81	127	39.03(5)	63-99	152
	64-77	361	39.03(6)	64-43	307
27.52	63-90	137	39.09(2)	64-43	307
	64-83	374	39.12(3)	64-43	307
27.52(1)	64-77	361	39.18(5)	64-94	390
27.53	63-77	120	40.01	64-163	489
27.53(1)	63-77	120	40.12, 40.13	63-119	179
	63-82	127	42.10	64-64	343
27.54	63-77	120		64-75	357
27.55, 27.56	63-77	120	42.19	64-64	343
	63-90	137	43.09	64-66	346
27.57, 27.58	63-77	120	44.01-44.11	63-121	181
	63-90	137	45.01	64-64	343
	64-77	361	46.12	64-147	466
	64-83	374	47.48	63-75	116
28.06	64-81	369	48.13	64-75	357
28.22, 28.221	63-27	39			
	63-106	162			

CITATOR TO FLORIDA STATUTES

Section	Opinion	Page	Section	Opinion	Page
49.03	64-150	474	112.061 (cont.)	63-117	177
54.04-54.06	64-47	315		63-119	179
55.45	63-79	125		64-2	248
58.01	64-179	515		64-21	277
58.10	63-115	174		64-69	349
62.23	63-111	168		64-118	421
63.08	64-64	343		64-141	455
72.05, 72.27, 72.39	64-89	383	112.061(1)	64-2	248
74.05	64-47	315	112.061(1)(b)1.	63-114	172
76.12	63-109	165		63-117	177
77.18	63-109	165	112.061(1)(b)2.	63-117	177
78.01	64-91	387		64-118	421
78.07	63-109	165	112.061(2)	63-72	110
83.12	63-109	165		63-95	147
84.011(14)	64-45	312	112.061(2)(a)	63-117	177
	64-122	427	112.061(2)(c)	63-72	110
84.061	64-122	427		63-77	120
90.01	64-81	369		63-114	172
90.14	64-69	349	112.061(2)(d)	63-72	110
90.141	63-114	172		63-114	172
	64-69	349	112.061(2)(e)	63-72	110
95.021	63-54	82	112.061(2)(k)	63-114	172
97.041	64-39	299		63-119	179
	64-147	466		64-69	349
	64-163	489	112.061(2)(l)	63-114	172
97.041(5)	64-87	380		63-119	179
97.051	64-147	466		64-69	349
97.063	64-39	299	112.061(2)(m)	63-114	172
99.021	64-163	489		63-119	179
100.011(3)	63-25	33		64-69	349
100.161, 100.342	63-25	33	112.061(4)	63-114	172
101.051-101.071	64-126	431		63-117	177
101.51	64-126	431		63-119	179
101.62	63-25	33	112.061(4)(a),(b)	63-114	172
102.021	63-119	179	112.061(5)	64-2	248
	64-141	455	112.061(5)(b)	64-69	349
103.021(3)	64-32	289	112.061(6)(a),(b)	63-95	147
103.071	64-141	455	112.061(6)(b)2.	63-88	135
103.101	64-32	289	112.061(7)(d),(f)	63-117	177
103.101(1)	64-37	297	112.061(10)(b)	63-117	177
103.102	64-141	455	113.05	64-99	396
103.121	64-114	414	113.07(1),(3)	64-99	396
104.011	64-3	249	114.01	64-163	489
104.031, 104.041	64-3	249	115.07, 115.08	64-119	422
104.061(2)	64-3	249	115.09, 115.14	64-125	430
104.15	64-3	249	116.03	63-113	171
104.181	64-147	466	117.01	63-111	168
104.31	63-69	107		64-81	369
104.34	64-3	249	117.02	63-111	168
104.37	64-3	249	117.03-117.05	64-81	369
104.39	64-3	249	120.011-120.071	64-167	493
104.45	64-3	249	120.09	64-167	493
110.01	63-142	210	120.20-120.28	64-76	359
112.05	63-94	145		64-167	493
112.061	63-72	110	120.24(1)	63-93	143
	63-77	120	120.25, 120.28	63-93	143
	63-88	135	120.30-120.331	64-167	493
	63-95	147	121.14	63-42	67
	63-114	172	122.02	64-127	431

CITATOR TO FLORIDA STATUTES

Section	Opinion	Page	Section	Opinion	Page
122.02 (cont.)	64-156	479	145.14 (cont.)	64-94	390
	64-174	508	150.09	63-129	191
122.02(1)	63-61	94	153.01-153.20	63-127	190
	64-33	291	153.53-153.88	63-127	190
122.02(3)	63-159	241	154.02, 154.04	63-142	210
	64-33	291	155.09-155.11	63-20	28
122.03	63-147	224	155.12	63-20	28
122.061	64-127	431		64-129	434
122.08	63-147	224	155.15, 155.17	63-20	28
122.10(3)	63-94	145	158.03	64-141	455
122.12	63-110	167	165.19	64-76	359
122.16	63-42	67	167.43	64-23	279
	64-33	291	167.61	64-162	488
122.19	64-156	479	167.72	64-169	494
123.01, 123.02	63-159	241	167.74	63-41	63
123.03	63-139	208	168.03	64-36	296
	64-19	273	175.032(1)	63-134	201
123.12, 123.13	64-19	273	175.041	63-130	193
123.15	64-19	273	175.091(2)	63-130	193
123.22-123.44	63-159	241	177.05	63-27	39
125.01	64-63	341	177.11, 177.12	64-31	288
125.01(1)	64-63	341	185.03	63-130	193
125.01(2)	64-168	494	185.07(2), 185.35(2)	63-130	193
125.01(3)	64-134	444	192.02	63-15	21
125.01(4)	64-88	381	192.03	63-44	71
	64-96	392		63-78	122
125.03, 125.04	63-113	171		64-12	264
125.08	63-133	198		64-135	445
	64-120	424	192.04	63-24	32
125.22	64-63	341		64-35	294
125.31	64-183	520	192.06	63-17	25
125.35, 125.36	64-149	472		63-34	50
125.43(1)	63-82	127		63-92	140
129.01	64-101	399		63-138	206
129.01(1)	64-129	434	192.06(1)	63-73	113
129.03(2)(a)	64-101	399		63-138	206
129.06(1)	64-22	278	192.06(2)	63-36	54
134.14	63-42	67		63-73	113
136.01-136.08	64-111	409		63-138	206
136.02	63-104	159	192.06(4)	63-5	6
	63-118	178	192.062	63-138	206
	64-111	409	192.141	63-8	11
136.02(1)	63-84	130	192.16	64-169	494
	63-118	178	192.21	63-24	32
	64-25	282		63-27	39
136.02(4)	63-39	59		63-43	68
136.02(5)	63-84	130		63-79	125
	63-118	178		64-7	254
142.01	64-83	374		64-13	266
	64-158	483		64-35	294
145.021	64-94	390		64-140	452
145.061	64-94	390		64-151	475
	64-129	434	192.22	64-35	294
	64-159	484	192.31	64-171	497
145.08	64-29	286	192.54	64-6	253
145.12	63-113	171	192.62	63-73	113
145.12(3)	64-159	484	193.021	64-90	385
145.13	64-29	286		64-116	416
145.14	63-113	171			

CITATOR TO FLORIDA STATUTES

Section	Opinion	Page	Section	Opinion	Page
193.021 (cont.)	64-140	452	199.02(2)	63-154	233
	64-171	497		64-60	332
193.03	64-124	429	199.02(3)	63-44	71
	64-129	434		64-12	264
	64-171	497		64-53	325
193.03(1)	64-124	429		64-60	332
	64-129	434	199.02(4)	64-12	264
193.03(2),(3)	64-124	429		64-53	325
193.03(6)	64-129	434	199.02(5)	63-3	4
193.06	63-87	134		63-6	8
	64-116	416		63-135	202
	64-171	497		64-53	325
193.11	63-87	134		64-143	458
	64-116	416	199.05	63-6	8
	64-171	497		63-87	134
193.11(3)	64-7	254		64-12	264
	64-90	385		64-135	445
	64-140	452	199.07	63-24	32
193.12	63-87	134	199.11	63-3	4
	64-171	497		63-44	71
193.13	63-87	134		64-60	332
	64-116	416		64-135	445
	64-171	497	199.11(3)	63-51	79
193.20	63-43	68		63-141	209
193.201	64-7	254		64-12	264
	64-90	385		64-60	332
193.22	63-87	134	199.11(5)	64-49	317
	64-116	416	199.15	64-35	294
	64-171	497	199.18	63-76	117
193.221	63-125	185		64-35	294
193.23	64-139	450	199.22	63-24	32
193.25	63-76	117		64-35	294
	64-140	452	199.23	63-24	32
193.27	64-140	452		64-35	294
193.29	64-171	497	199.29	64-139	450
193.34, 193.35	63-76	117	200.01	63-78	122
193.39	64-171	497		63-97	150
193.40	63-60	93	200.02	63-24	32
	64-22	278	200.06, 200.08	63-87	134
	64-54	326	200.16	64-139	450
	64-171	497	200.24	63-128	191
193.41, 193.45, 193.51	63-76	117	200.27	63-40	62
193.57	63-65	101		63-60	93
193.65	63-127	190		63-76	117
	64-93	388	200.30	63-40	62
194.02, 194.13	63-43	68	200.36	64-54	326
194.15-194.19	63-79	125	200.45	63-40	62
194.21	63-65	101	201.02	63-18	26
	63-79	125		63-107	163
194.22	63-65	101		63-116	175
196.01	64-140	452		63-131	195
196.14, 196.16	64-171	497		64-41	302
198.04	63-140	209	201.04	64-30	287
199.01	64-12	264	201.05	63-7	9
	64-53	325		64-30	287
	64-143	458	201.08	63-38	57
199.02	63-6	8		63-44	71
	64-53	325		63-116	175
	64-135	445			

CITATOR TO FLORIDA STATUTES

Section	Opinion	Page	Section	Opinion	Page
201.08	63-136	203	215.20	63-143	214
	64-12	264	215.22(22)	63-143	214
	64-49	317	215.26	64-54	326
201.09	63-44	71	216.09, 216.10	63-155	234
	63-141	209	216.171(3)	63-142	210
201.10	64-6	253	216.171(4)	63-155	234
201.21	64-82	371	222.15, 222.16	63-122	181
203.01	63-100	154	222.17	64-147	466
	64-50	319	222.17(2)	64-39	299
203.02	64-50	319	228.041(1)	63-34	50
204.02	63-124	184	229.07, 229.08	63-143	214
	63-153	231	229.25-229.50	64-103	400
205.01	63-54	82	230.201	64-141	455
	63-68	105	230.23(5)(a),(d)	64-100	397
205.02	64-23	279	230.23(9)(d)	63-53	81
	64-54	326	230.23(10)(i)	63-53	81
	64-112	413		63-118	178
205.13	64-23	279		64-86	379
205.15	63-54	82	230.28	64-182	519
	64-54	326	230.30	64-100	397
205.16-205.19	63-54	82	230.302	64-29	286
205.29	63-68	105	230.33(7)(a)	64-100	397
205.322	63-157	238	230.35	64-142	457
205.41	64-54	326	230.43(2)	64-100	397
205.49	63-54	82	230.43(5)	64-142	457
205.52	63-54	82	231.16(2)(a)	64-56	328
	63-103	157	231.36	63-120	180
	64-23	279	231.36(4)	64-74	356
	64-54	326	231.36(5)	64-26	284
	64-123	428	231.37	63-160	244
205.53	63-103	157	231.47	64-26	284
205.58	63-68	105	232.04, 232.05	63-34	50
205.59	63-35	52	234.08, 234.081	63-149	226
	63-68	105	235.04	63-59	91
	64-112	413		64-86	379
205.64	64-80	368	235.32	64-45	312
205.68	63-68	105	236.02	64-1	245
208.01	63-124	184	236.021	63-2	2
	63-153	231		64-1	245
208.45	64-106	405	236.074	64-111	409
212.02	63-89	136	236.17	63-143	214
212.02(12)	64-9	256	236.171(1)	63-143	214
212.02(16)	63-123	182	236.24, 236.30	64-111	409
	63-132	196	236.32(7)	63-25	33
	64-9	256	236.36-236.57	63-53	81
212.04	63-123	182	236.55	64-111	409
	63-132	196	237.02	63-53	81
	63-157	238		63-143	214
	64-9	256	237.02(1)-(9)	63-143	214
212.04(2)	63-123	182		64-40	302
	63-132	196	237.09-237.24	64-129	434
212.05	64-9	256	237.27	63-53	81
212.08(8)	63-157	238		64-111	409
212.08(8)(a)	63-143	214	237.32	63-143	214
212.12(10)	63-123	182		64-111	409
	63-132	196	238.07	64-26	284
212.13(2)	63-74	115	252.09	64-24	280
215.19	64-10	260	252.10(1)	64-24	280
	64-45	312	252.11(2)(b)	64-24	280

CITATOR TO FLORIDA STATUTES

Section	Opinion	Page	Section	Opinion	Page
253.12	64-61	334	371.121	63-78	122
253.51-253.58	64-149	472	371.0100	63-78	122
253.60-253.62	64-149	472		63-80	126
253.65	63-67	103		63-97	150
255.05	64-45	312	371.0100-371.0108	63-78	122
	64-98	395	371.0102	63-78	122
	64-120	424		63-80	126
	64-122	427		63-97	150
272.18	64-141	455	371.0103	63-80	126
274.01(1),(3)	63-20	28		63-97	150
274.09	63-20	28	371.0104	63-78	122
282.01(1)	63-155	234		63-97	150
282.01(2)	63-13	19	371.0105	63-97	150
	63-77	120	377.02, 377.18	64-149	472
	63-143	214	377.19-377.40	64-149	472
	64-1	245	378.29	64-61	334
282.01(11)	64-97	394		64-93	388
282.011(8)	63-123	182	378.30	64-61	334
282.011(9)	63-77	120	381.031(4)	63-126	187
	63-90	137	381.271	64-80	368
282.021(33)	63-142	210	381.411	63-126	187
282.051	63-142	210	388.011	63-133	198
	63-155	234	388.131	64-174	508
282.051(3)(a),(b)	63-142	210	388.141	64-141	455
282.051(3)(d),(e)	63-155	234		64-174	508
282.071	63-14	20	388.201, 388.221	64-129	434
	63-143	214	388.231, 388.271	63-133	198
282.092	63-142	210	388.351, 388.381	63-133	198
283.01	64-170	495	394.21	64-88	381
283.03-283.07	64-170	495	394.22	63-42	67
288.153	63-104	159		64-88	381
289.181	64-6	253	394.22(1)	64-88	381
298.11	64-114	414	394.22(5)(b)	64-88	381
298.14	64-141	455	394.22(6)	63-42	67
317.011-317.0108	63-149	226	394.22(7)(a)-(c)	64-88	381
317.791	64-152	476	394.22(12)	64-51	322
317.841	63-149	226	394.22(13)	64-88	381
317.902(1),(2)	63-149	226	394.23	64-88	381
317.951, 317.952	63-149	226	398.18(1)	64-78	366
317.01011	64-153	477	400.01	63-126	187
320.02	64-44	310	400.13, 400.161	63-126	187
320.07	63-40	62	401.06	64-96	392
320.08	64-44	310	401.12(2)	63-126	187
320.27	64-92	388	403.02(4)	64-52	323
320.37, 320.38	64-44	310	403.10, 403.13	64-52	323
322.03(1)(a)	64-44	310	403.14-403.18	64-52	323
322.04(3),(5)	64-44	310	421.03(1)	64-117	419
322.05, 322.12, 322.27	64-137	449	421.04, 421.08, 421.09	64-117	419
330.06	63-97	150	423.01	64-117	419
339.30	64-152	476	423.03	64-143	458
340.05	64-141	455	440.13	64-11	263
340.06(17),(18)	63-155	234	440.38(5)	64-134	444
344.26	63-56	85	443.12(6),(11)	63-14	20
349.13	64-143	458	446.09, 446.11	64-10	260
370.01(16),(17)	63-67	103	450.071	63-16	23
370.02(2)(f)	63-67	103	458.121(2)	63-93	143
370.02(9)	63-67	103	458.13(1)	64-115	415
370.06(5)	63-78	122	458.13(2)(g)	64-115	415
371.021, 371.061	63-78	122	458.15(2)(a)	64-115	415

CITATOR TO FLORIDA STATUTES

Section	Opinion	Page	Section	Opinion	Page
460.23	64-175	510	561.34(11)	63-16	23
463.01	63-144	216	562.11	63-16	23
464.012	63-126	187		63-23	31
465.051	64-141	455	562.111, 562.13,		
467.09, 467.17, 467.18	64-84	376	562.48	63-16	23
471.05, 471.07,			601.06	64-141	455
471.08, 471.33	64-84	376	608.03(1)(b)	64-41	302
475.13	64-23	279	608.10	64-114	414
475.14	64-123	428	608.60	63-3	4
476.071(2)	64-14	268	613.07	64-179	515
476.221-476.223	64-95	391	616.07	63-123	182
476.25-476.32	63-37	56	616.12, 616.15	63-157	238
477.06	64-131	438	619.06	64-114	414
477.07	64-131	438	621.05, 621.07, 621.09,		
477.08(6)(d)	64-131	438	621.11, 621.13	64-30	287
477.17	64-108	407	624.0203	64-160	487
480.02(3)	63-54	82	625.121	64-141	455
484.02	63-144	216	626.0218(1)	64-48	317
489.03	64-141	455	626.0611	64-68	349
491.03	64-110	408	627.0900(1)	63-109	165
493.01-493.24	63-103	157	627.0901(1)	63-109	165
	63-145	220	629.011	64-160	487
494.02(3)	64-38	298	629.021(1),(2)	64-160	487
	64-71	355	629.041(1),(2)	64-160	487
494.03	64-38	298	639.07(2)	64-148	471
	64-71	355	641.07	64-141	455
494.04(1)	64-71	355	659.271	64-79	367
494.08(5)	64-71	355	665.43	63-41	63
500.03(10),(12)	64-146	464		64-111	409
500.04, 500.24	64-146	464	665.44	63-22	31
501.04	64-97	394		64-111	409
501.04(12)	63-143	214		64-183	520
501.09	64-97	394	674.04	64-12	264
502.04	64-133	441	683.01-683.06	64-79	367
504.02, 504.06	64-114	414	683.01-683.07	63-79	125
509.141	63-71	109	689.01	63-27	39
509.241(3)	64-76	359	689.15	63-29	43
509.242	64-15	269	695.01	63-27	39
509.261	64-76	359	696.05(2)	63-106	162
517.02(1),(3)	64-177	511	697.01, 697.02	64-62	336
520.01-520.13	63-33	49		64-82	371
	63-35	52	697.04	64-49	317
520.02	63-33	49	701.03	63-106	162
	63-35	52	711.01-711.23	64-20	275
520.03	63-35	52	711.03	64-20	275
520.30-520.42	63-33	49		64-62	336
	63-38	57	711.04	64-20	275
520.31-520.42	63-33	49		64-62	336
526.12-526.20	64-117	419		64-70	352
527.01, 527.02	64-117	419	711.05	64-62	336
542.12	64-121	425	711.08	63-152	230
550.03	64-141	455		64-62	336
550.08	64-157	481	711.09(1),(3)	63-152	230
550.09	63-123	182	711.19	64-20	275
	63-132	196		64-70	352
551.04(1)	64-157	481	711.20	64-62	336
551.12, 551.15	64-157	481	717.03-717.10	64-47	315
559.30-559.47	64-148	471	717.12	64-47	315
559.43	63-3	4	733.15	63-24	32

CITATOR TO FLORIDA STATUTES

Section	Opinion	Page	Section	Opinion	Page
733.16	64-35	294	903.31	63-150	227
741.06	63-111	168	903.34(2)	63-30	44
743.02	63-111	168	903.50	63-109	165
775.10, 775.11	64-77	361	909.04	64-107	406
775.13	63-66	102	921.02, 921.05	64-163	489
782.07	63-62	95	921.15	63-19	28
796.07	64-76	359		64-184	521
811.16, 811.17	64-17	272	924.06(1),(2)	64-163	489
817.42	64-146	464	924.09	64-77	361
832.05(3)	64-91	387	924.15	63-109	165
839.07-839.221	63-83	129	924.17	64-77	361
839.09	63-118	178	924.23	64-144	460
849.06	63-16	23		64-158	483
849.09	63-153	231	925.05	64-16	269
	64-154	478		64-107	406
849.091	64-46	313	932.36	63-101	156
849.092	63-124	184		64-83	374
	63-153	231	932.37	63-101	156
849.14	64-46	313		64-83	374
859.06	63-23	31	939.07	63-101	156
901.15	64-154	478		64-66	346
902.19	64-69	349	944.54	63-57	87
902.19(4)	63-114	172	945.21(1)(c)	63-57	87
	64-69	349	948.01	64-163	489
903.09	63-109	165	951.16	64-184	521
903.26-903.32	63-112	170	965.01	63-115	174
903.26(1)	63-150	227			

CITATOR TO CHAPTERS, FLORIDA STATUTES

Chapter	Opinion	Page	Chapter	Opinion	Page
18	63-41	63	122 (cont.)	63-94	145
	63-104	159		63-147	224
25	64-19	273		64-27	285
27	64-77	361		64-33	291
28	64-89	383		64-127	431
34	64-94	390		64-156	479
38	64-19	273	123	63-139	208
39	64-43	307		63-159	241
	64-94	390		64-19	273
40	63-119	179		64-27	285
42	64-64	343	129	64-22	278
48	64-75	357		64-27	285
72	64-89	383		64-101	399
84	64-98	395		64-129	434
	64-122	427	134	63-139	208
90	63-114	172		63-147	224
	63-119	179	136	63-41	63
104	64-3	249		63-104	159
110	63-142	210		63-143	214
113	63-72	110		64-25	282
115	64-119	422		64-111	409
117	63-111	168	145	64-29	286
120	64-167	493		64-94	390
121	63-139	208		64-159	484
	63-147	224	153	63-127	190
122	63-42	67	154	63-142	210
	63-61	94			

CITATOR TO CHAPTERS, FLORIDA STATUTES

Chapter	Opinion	Page	Chapter	Opinion	Page
155	63-20	28	323	63-145	220
	64-96	392	350-364	64-50	319
	64-129	434	366, 367	64-50	319
175	63-130	193	370	63-67	103
	63-134	201		63-97	150
177	63-6	8	371	63-78	122
	63-27	39		63-80	126
185	63-130	193	372	63-97	150
	63-134	201	378	64-93	388
198	63-32	47	388	63-133	198
199	63-3	4		64-129	434
	63-6	8		64-174	508
	63-116	175	390	64-174	508
	63-135	202	394	64-51	322
	63-154	233	400	63-126	187
	64-12	264	401	64-96	392
	64-35	294	403	64-52	323
	64-53	325	420	63-104	159
	64-104	402	421	63-39	59
	64-139	450		64-117	419
	64-143	458	440	63-85	132
200	64-8	255		64-134	444
	64-139	450	446	63-14	20
201	63-131	195		64-10	260
	64-41	302	453	63-86	133
	64-82	371	458	64-115	415
203	63-100	154		64-121	425
	64-50	319	463	63-144	216
204	63-124	184	467	64-84	376
	63-153	231	471	64-84	376
	64-46	313	475	64-23	279
205	63-54	82	476	64-130	437
	63-145	220	477	64-131	438
	64-23	279	480	63-54	82
	64-54	326	484	63-144	216
	64-123	428	494	64-38	298
	64-145	462	500	64-146	464
208	63-124	184	501	64-97	394
	63-153	231	504	64-114	414
	64-46	313	517	64-177	511
212	63-89	136	518	63-3	4
	63-132	196	527	64-50	319
	63-157	238		64-117	419
	64-9	256	561	63-16	23
213	64-50	319	608	64-30	287
230	63-160	244		64-41	302
237	63-104	159	613	64-179	515
	64-55	328	616	63-157	238
238	64-27	285	617	63-16	23
252	64-24	280		63-17	25
274	63-20	28		63-92	140
282	63-142	210	621	64-30	287
283	64-170	495	627	63-109	165
288	63-104	159	639	64-148	471
289	64-6	253	656-668	63-104	159
317	63-149	226	665	63-41	63
	64-8	255	711	64-20	275
	64-153	477		64-62	336
320	64-8	255		64-70	352

CITATOR TO CHAPTERS, FLORIDA STATUTES

Chapter	Opinion	Page	Chapter	Opinion	Page
717	64-47	315	903	63-112	170
849	64-154	478	924	64-77	361
875	64-3	249			

CITATOR TO STATE CONSTITUTION

Article	Opinion	Page	Article	Opinion	Page
DR., §9	64-172	503	VIII, §7	63-72	110
DR., §14	63-30	44		64-174	508
	64-66	346	VIII, §11	63-137	204
II	63-64	100		63-142	210
III, §2	63-46	73		64-63	341
III, §5	63-12	17		64-116	416
	63-155	234	VIII, §11(1)		
III, §7	63-113	171	(c)-(e)	63-137	204
	63-155	234	VIII, §11(5)	63-137	204
III, §12	63-26	36		63-142	210
	64-173	505	VIII, §11(6)	63-142	210
III, §16	63-94	145	VIII, §11(9)	63-142	210
III, §17	63-26	36		64-116	416
	64-173	505	VIII, §22	63-137	204
III, §18	63-94	145	IX	64-178	514
III, §20	63-28	41	IX, §1	63-3	4
	64-116	416		63-5	6
	64-169	494		63-17	25
III, §21	63-26	36		63-34	50
	64-173	505		63-36	54
III, §26	64-3	249		63-51	79
III, §27	63-77	120		63-92	140
III, §28	63-26	36		63-135	202
	63-46	73		63-138	206
	63-94	145		63-146	222
III, §29	63-88	135		63-156	237
III, §30	64-1	245		64-12	264
IV, §6	63-72	110		64-34	293
IV, §7	64-182	519		64-60	332
IV, §15	63-72	110		64-65	345
	63-91	140		64-116	416
IV, §18	63-46	73		64-140	452
IV, §29	63-88	135		64-143	458
V, §2	63-159	241		64-171	497
V, §6(3)	64-75	357	IX, §§2,3	64-97	394
V, §§9B,9C	63-72	110	IX, §4	63-77	120
V, §17	63-159	241		64-97	394
V, §19	63-159	241		64-162	488
	64-21	277	IX, §5	63-137	204
	64-118	421		64-23	279
V, §49	63-159	241		64-169	494
VI, §1	63-111	168	IX, §6	63-39	59
	64-39	299	IX, §9	64-178	514
	64-147	466	IX, §10	63-63	99
VI, §5	64-87	380		64-111	409
VI, §19	64-63	341	IX, §11	63-140	209
VII, §3	63-12	17	IX, §13	63-80	126
VIII	63-137	204		63-97	150
VIII, §1	63-138	206		64-8	255
VIII, §5	64-63	341	IX, §16	63-56	85
VIII, §6	63-28	41	X, §1	63-151	228
	64-85	378		64-128	432

CITATOR TO STATE CONSTITUTION

Article	Opinion	Page	Article	Opinion	Page
X, §7	63-8	11	XII, §17	63-53	81
	63-9	12	XII, §18	63-52	81
	63-10	13	XIII, §3	64-96	392
	63-29	43	XIV, §4	64-87	380
	63-47	75	XVI, §§4A-4D	64-21	277
	63-127	190	XVI, §9	63-101	156
	63-151	228		64-59	330
	64-5	251		64-66	346
	64-20	275	XVI, §15	63-111	168
	64-39	299		63-113	171
	64-62	336		64-81	369
	64-116	416	XVI, §16	63-3	4
	64-128	432		63-5	6
	64-169	494		63-17	25
	64-171	497		63-34	50
	64-178	514		63-36	54
XII, §2	63-28	41		63-92	140
XII, §2A	63-28	41		63-135	202
XII, §2B	63-25	33		63-138	206
	63-28	41		63-146	222
	63-129	191		63-156	237
XII, §2B(1)	63-25	33		64-34	293
	63-129	191		64-65	345
	64-85	378		64-117	419
XII, §2B(2)	63-25	33		64-143	458
	63-129	191	XVII, §1	63-26	36
XII, §2B(3)	63-129	191		64-173	505
XII, §8	64-178	514	XVII, §2	63-26	36
XII, §9	64-176	510		64-173	505
XII, §10	64-178	514	XVII, §3	63-26	36
XII, §13	64-176	510		64-173	505

CITATOR TO SESSION LAWS

Chapter, Year	Opinion	Page	Chapter, Year	Opinion	Page
11, Acts 1845	64-63	341	14723, Acts 1931	64-105	404
1713, Acts 1869	63-5	6		64-181	517
	64-139	450	15658, Acts 1931	63-100	154
3662, Acts 1885	63-5	6		64-50	319
4357, Acts 1895	64-88	381	15751, Acts 1931	64-181	517
4600, Acts 1897	63-133	198	15789, Acts 1931	64-60	332
4742, Acts 1899	63-111	168	17906, Acts 1937	64-183	520
5437, Acts 1905	64-8	255	17981, Acts 1937	64-117	419
6212, Acts 1911	64-8	255	18011, Acts 1937	64-23	279
6470, Acts 1913	64-3	249	19183, Acts 1939	64-130	437
6772, Acts 1913	63-133	198	19272, Acts 1939	63-115	174
6880, Acts 1915	64-8	255	19554, Acts 1939	64-69	349
7275, Acts 1917	64-8	255	20425, Acts 1941	63-37	56
7384, Acts 1917	64-41	302	20504, Acts 1941	64-88	381
9274, Acts 1923	63-72	110	20722, Acts 1941	64-54	326
10040, Acts 1925	63-27	39	20723, Acts 1941	64-54	326
	63-43	68		64-139	450
	64-151	475	20724, Acts 1941	64-60	332
10182, Acts 1925	64-8	255		64-139	450
10282, Acts 1925	64-54	326	20858, Acts 1941	63-5	6
11954, Acts 1927	64-159	484	20936, Acts 1941	64-93	388
14650, Acts 1931	64-130	437	21691, Acts 1943	64-183	520
14658, Acts 1931	64-165	491	21759, Acts 1943	64-89	383

CITATOR TO SESSION LAWS

Chapter, Year	Opinion	Page	Chapter, Year	Opinion	Page
21853, Acts 1943	63-56	85	61-266, Acts 1961	63-73	113
21874, Acts 1943	63-61	94	61-280, Acts 1961	64-167	493
21918, Acts 1943	64-93	388	61-291, Acts 1961	63-147	224
21943, Acts 1943	64-60	332	61-295, Acts 1961	64-112	413
21988, Acts 1943	64-169	494	61-354, Acts 1961	63-126	187
22938, Acts 1945	64-156	479	61-400, Acts 1961	63-13	19
23157, Acts 1945	64-88	381	61-401, Acts 1961	63-142	210
23259, Acts 1945	64-156	479	61-406, Acts 1961	63-112	170
23338, Acts 1945	63-131	195	61-669, Acts 1961	64-93	388
23483, Acts 1945	64-101	399	61-691, Acts 1961	63-64	100
23825, Acts 1947	64-89	383		64-171	497
23932, Acts 1947	63-115	174	61-1154, Acts 1961	64-94	390
23958, Acts 1947	63-147	224	61-1338, Acts 1961	64-94	390
24302, Acts 1947	64-50	319	61-2275, Acts 1961	64-96	392
24337, Acts 1947	64-141	455	61-2290, Acts 1961	64-127	431
24819, Acts 1947	64-21	277	61-2329, Acts 1961	63-61	94
24868, Acts 1947	64-159	484	61-2394, Acts 1961	63-133	198
25209, Acts 1949	64-93	388	61-2665, Acts 1961	64-101	399
25270, Acts 1949	64-93	388	61-2675, Acts 1961	64-101	399
25289, Acts 1949	64-118	421	61-2754, Acts 1961	64-159	484
25999, Acts 1949	64-84	376	63-2, Acts 1963	64-90	385
26106, Acts 1949	64-98	395		64-141	455
26319, Acts 1949	64-9	256	63-5, Acts 1963	64-2	248
26545, Acts 1951	64-50	319	63-8, Acts 1963	63-149	226
26592, Acts 1951	63-142	210	63-12, Acts 1963	63-99	152
26870, Acts 1951	64-3	249	63-35, Acts 1963	63-152	230
26899, Acts 1951	64-169	494		64-20	275
27962, Acts 1951	64-21	277		64-62	336
28048, Acts 1953	64-121	425	63-40, Acts 1963	63-67	103
28258, Acts 1953	63-42	67	63-41, Acts 1963	63-75	116
29502, Acts 1953	64-159	484		63-96	149
29703, Acts 1955	64-89	383		63-98	151
29801, Acts 1955	63-147	224	63-96, Acts 1963	63-71	109
29838, Acts 1955	64-19	273	63-112, Acts 1963	63-84	130
30958, Acts 1955	64-84	376		63-118	178
31171, Acts 1955	64-101	399	63-122, Acts 1963	64-2	248
57-363, Acts 1957	63-147	224	63-138, Acts 1963	63-111	168
57-1226, Acts 1957	64-33	291	63-162, Acts 1963	64-183	520
57-1520, Acts 1957	63-133	198	63-165, Acts 1963	63-122	181
57-1795, Acts 1957	64-159	484	63-175, Acts 1963	63-149	226
57-1796, Acts 1957	64-159	484	63-188, Acts 1963	63-143	214
59-23, Acts 1959	63-104	159	63-192, Acts 1963	64-2	248
59-26, Acts 1959	63-104	159	63-195, Acts 1963	64-131	438
59-181, Acts 1959	64-54	326	63-236, Acts 1963	63-133	198
59-195, Acts 1959	63-133	198		64-174	508
	64-174	508	63-245, Acts 1963	64-90	385
59-226, Acts 1959	64-90	385	63-247, Acts 1963	63-157	238
59-270, Acts 1959	63-8	11	63-250, Acts 1963	64-90	385
59-303, Acts 1959	63-147	224		64-116	416
59-372, Acts 1959	64-50	319		64-124	429
59-389, Acts 1959	63-104	159		64-140	452
59-417, Acts 1959	64-157	481		64-171	497
59-730, Acts 1959	63-52	81	63-253, Acts 1963	64-50	319
59-1385, Acts 1959	64-96	392	63-263, Acts 1963	64-16	269
59-1481, Acts 1959	63-63	99	63-271, Acts 1963	64-54	326
59-1542, Acts 1959	64-84	376	63-300, Acts 1963	63-77	120
59-1903, Acts 1959	64-33	291		63-143	214
61-1, Acts 1961	64-90	385		63-155	234
61-263, Acts 1961	64-1	245		64-1	245

CITATOR TO SESSION LAWS

Chapter, Year	Opinion	Page	Chapter, Year	Opinion	Page
63-337, Acts 1963	63-143	214	63-410, Acts 1963	63-77	120
63-340, Acts 1963	63-103	157		63-90	137
	63-145	220	63-462, Acts 1963	63-159	241
63-342, Acts 1963	63-138	206	63-463, Acts 1963	64-1	245
63-355, Acts 1963	63-125	185	63-508, Acts 1963	63-114	172
63-365, Acts 1963	63-121	181		64-69	349
63-375, Acts 1963	63-142	210	63-514, Acts 1963	63-142	210
63-376, Acts 1963	63-143	214	63-526, Acts 1963	63-89	136
63-380, Acts 1963	64-10	260		63-123	182
63-393, Acts 1963	63-123	182		63-132	196
63-400, Acts 1963	63-72	110		64-9	256
	63-77	120	63-550, Acts 1963	63-78	122
	63-88	135		63-80	126
	63-95	147		63-97	150
	63-119	179		63-128	191
	64-2	248	63-553, Acts 1963	63-124	184
	64-21	277		63-153	231
	64-69	349	63-555, Acts 1963	63-94	145
	64-118	421	63-560, Acts 1963	63-113	171
	64-141	455	63-565, Acts 1963	63-157	238
63-409, Acts 1963	63-77	120	63-572, Acts 1963	64-94	390
	63-81	127	63-575, Acts 1963	64-24	280
	63-82	127	63-659, Acts 1963	63-64	100
	63-90	137	63-707, Acts 1963	64-93	388
	64-77	361	63-1447, Acts 1963	64-156	479
	64-83	374			
	64-158	483			

REVISED GENERAL STATUTES OF 1920

Section	Opinion	Page
1006	64-8	255
1925-1939	63-133	198

**COMPILED GENERAL LAWS OF 1927
AND SUPPLEMENT OF 1936**

Section	Opinion	Page
2405	64-25	282
4672	64-179	515
8467	64-172	503

CITATOR

OF

OMITTED OPINIONS TO FLORIDA STATUTES, LAWS OF FLORIDA
AND STATE CONSTITUTION CONSTRUED OR CITED IN OPINIONS
REPORTED IN 1963-1964.

FLORIDA STATUTES

Section	Opinion	Section	Opinion
27.50-27.54	64-73	142.09	64-28
27.51	64-102	185.01	63-70
27.53	64-73	282.01(10)	64-4
27.55-27.57	64-73	282.011	64-73
27.58	64-73	282.012(2)(b)	64-4
	64-102	388.201(4)	64-109
28.24	63-48	624.02	64-161
28.241(2)	63-48	632.031	64-161
29.02, 29.03	64-28	632.051(1)(b),(c)	64-161
104.42	64-73	924.23	64-28
129.01, 129.06	64-73		

CHAPTERS

FLORIDA STATUTES

Chapter	Opinion	Chapter	Opinion
129	64-73	185	63-70
169	63-70		64-155
175	63-70	332	64-166
	64-155	632	64-161

STATE CONSTITUTION

Article	Opinion	Article	Opinion
VIII, §11	63-70	XVI, §9	64-28
IX, §6	63-4		
	64-166		

SESSION LAWS

Chapter, Year	Opinion	Chapter, Year	Opinion
59-780, Acts 1959	64-102	63-410, Acts 1963	64-73
59-877, Acts 1959	63-48	63-524, Acts 1963	64-4
61-1139, Acts 1961	64-102	63-1543, Acts 1963	64-109
61-2394, Acts 1961	64-109	63-1853, Acts 1963	64-166
63-409, Acts 1963	64-73		

COMPILED GENERAL LAWS OF 1927
AND SUPPLEMENTS OF 1936

Section	Opinion
4867	63-48